A.

THE PRIV.
Germania .

TUESDAY, OCTOBER 17, 1905
INDIANAPOLIS, INDIANA

FIRST ANNUAL REUNION

OF THE

AIKMAN FAMILY

HELD AT

THE PRIVATE GROUNDS OF THE GERMANIA PARK ASSOCIATION

INDIANAPOLIS, IND.

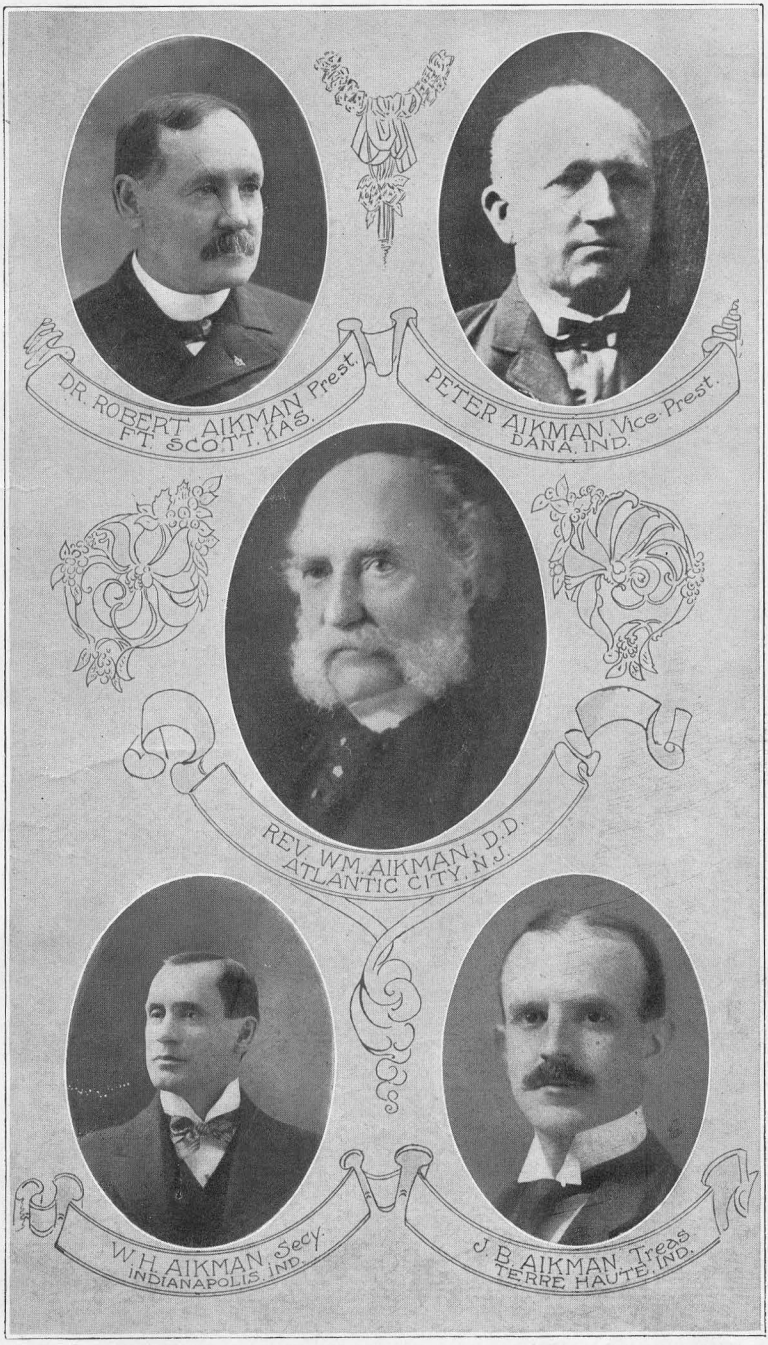
TUESDAY, OCTOBER 17, 1905

ROBERT AIKMAN, President
FORT SCOTT, KAS.

PETER AIKMAN, Vice-President
DANA, IND.

WILLIAM H. AIKMAN, Secretary
INDIANAPOLIS, IND.

JOHN B. AIKMAN, Treasurer
TERRE HAUTE, IND.


DR. ROBERT AIKMAN Prest.
FT. SCOTT, KAS.
PETER AIKMAN, Vice-Prest.
DANA, IND.
REV. WM. AIKMAN, D.D.
ATLANTIC CITY, N.J.
W. H. AIKMAN, Secy.
INDIANAPOLIS, IND.
J. B. AIKMAN, Treas
TERRE HAUTE, IND.

FIRST ANNUAL REUNION

OF THE

Aikman Family

HELD AT

GERMANIA PARK, INDIANAPOLIS, INDIANA

Tuesday, October 17, 1905

The purpose of this gathering was to perfect a permanent organization and thereby create an association to cement together the ties of blood and the pleasures of mutual acquaintance, both much to be desired, from the fact that the Aikman blood came from a strong and noble ancestory with a succession of branches that have proven beyond all fear of contradiction that good blood will tell. The idea of this gathering first originated in the mind of William H. Aikman, of Indianapolis, Ind., who, after mature deliberation, sent out communications to every born Aikman whose residence he could locate, with the request that such Aikman would sound the call of greeting to every known Aikman within reach.

The unexpected large attendance at this first gathering is fully proven by over one hundred Aikmans who answered the call by their presence and helped to make the very first reunion a grand and glorious success.

The larger part of names other than Aikmans represent the women of the family, who, by marriage, changed their names, and a goodly number of the names of men who recognized the value and virtues of the Aikman women and proved such recognition by marrying them.

Ninety-one members of the family seated at dinner, and considerable over 100 members of the family at the gathering.

NOTES AND GENERAL REPORT OF THE GATHERING

At 11 o'clock on the morning of October 17th, 1905, many of the limbs of the Aikman genealogical tree commenced to spread their branches adorned with rich family foliage over the beautiful surroundings of Germania Park, and before high noon arrived there was a gathering of broad smiles and hearty greetings that went to the hearts of every person present, leaving forever a sweet and sacred memory.

After these greetings dinner was served in the spacious dining pavilion on the grounds. After dinner the gathering went into executive session, and there effected a permanent organization.

On motion, Henry Aikman, of Washington, Ind., was made temporary chairman and Hon. Barton Scott Aikman, of Newport, Ind., temporary secretary.

It was called to the attention of the gathering that this date, October 17th, 1905, was the centennial of the birth of Barton Aikman, whose father, John Aikman, came to Davies county, Indiana, from Bourbon county, Kentucky, about the year 1810, and whose descendants constitute a greater part of all those present at this reunion. Letters and telegrams from New York, Atlantic City and California were read.

On motion, a vote of thanks was tendered Wm. H. Aikman for his efforts in originating and bringing about this reunion. The temporary presiding officer announced that the election of permanent officers would be in order, and on motion the members were elected to serve for the ensuing year:

President—Robert Aikman, M. D., Fort Scott, Kansas.
Vice-President—Peter Aikman, Dana, Indiana.
Secretary—Wm. H. Aikman, Indianapolis, Indiana.
Treasurer—Jno. B. Aikman, Terre Haute, Indiana.

Grace A. Bryant, Terre Haute, Indiana, was elected assistant secretary, to assist in arranging for the next reunion.

The following members signed the register as being present at this first reunion:

W. H. Aikman, Indianapolis, Ind.
Irene Aikman, Indianapolis, Ind.
Ada Aikman, Indianapolis, Ind.

Jennie Aikman, Indianapolis, Ind.
Bonnie Aikman, Indianapolis, Ind.
Mrs. W. A. Helphinstine, Indianapolis, Ind.
Carl B. Helphinstine, Indianapolis, Ind.
Louisa Aikman, Washington, Ind.
Sarah Bruner, Washington, Ind.
Ada Keller, Washington, Ind.
Lydia G. Aikman, Washington, Ind.
Henry Aikman, Washington, Ind.
Sarah L. Aikman, Washington, Ind.
Mattie Aikman, Washington, Ind.
H. C. Aikman, Washington, Ind.
W. M. Aikman, Washington, Ind.
Clara B. Cole, Washington, Ind.
Walter Cole, Washington, Ind.
Geo. E. Hopkins, Washington, Ind.
L. C. Aikman, Washington, Ind.
L. F. Corning, Washington, Ind.
Sarah Corning, Washington, Ind.
Lon Helphinstine, Washington, Ind.
Mrs. Emma Jones, Washington, Ind.
Samuel F. Aikman, Washington, Ind.
Sarah Corning, Washington, Ind.
H. C. Aikman, Washington, Ind.
F. F. Aikman, Crawfordsville, Ind.
Martha Aikman, Crawfordsville, Ind.
Chas. L. Harris, Crawfordsville, Ind.
Dora Harris, Crawfordsville, Ind.
Vivian Harris, Crawfordsville, Ind.
Lorens Harris, Crawfordsville, Ind.
Bertha J. Watson, Crawfordsville, Ind.
Nomma Watson, Crawfordsville, Ind.
Hubert Watson, Crawfordsville, Ind.
Zella Aikman, Crawfordsville, Ind.
Mary Klinger, Crawfordsville, Ind.
Jno. B. Aikman, Terre Haute, Ind.
Grace Bryant, Terre Haute, Ind.
Jno. A. Hawkins, Newberry, Ind.
Levi Aikman, Dana, Ind.
Marretta Aikman, Dana, Ind.
Dallye Kerns, Dana, Ind.

Katherine Kerns, Dana, Ind.
Emma D. Aikman, Dana, Ind.
H. M. Aikman, Dana, Ind.
Mina Aikman, Dana, Ind.
Mabel Aikman, Dana, Ind.
Robert Aikman, Dana, Ind.
Montford Aikman, Dana, Ind.
C. C. Aikman, Dana, Ind.
Mrs. C. C. Aikman, Dana, Ind.
Eliza A. Aikman, Dana, Ind.
W. M. Taylor, Dana, Ind.
Mrs. W. M. Taylor, Dana, Ind.
Peter Aikman, Dana, Ind.
Ellen Aikman, Dana, Ind.
Lucy J. Hooker, Dana, Ind.
Roy Aikman, Montezuma, Ind.
Hugh Aikman, Montezuma, Ind.
Milinda Aikman, Montezuma, Ind.
Elizabeth Aikman, Montezuma, Ind.
Mildred Aikman, Montezuma, Ind.
John Davidson, Lyons, Ind.
Effie Davidson, Lyons, Ind.
Earl Davidson, Lyons, Ind.
Lessie Davidson, Lyons, Ind.
Harriett Davidson, Lyons, Ind.
Lillie Aikman, Lyons, Ind.
Barton Scott Aikman, Newport, Ind.
Mary B. Aikman, Newport, Ind.
Nina Aikman, Newport, Ind.
E. A. Aikman, Clinton, Ind.
Laura B. Aikman, Clinton, Ind.
I. O. Price, Linton, Ind.
Ada Price, Linton, Ind.
Edith Price, Linton, Ind.
Arch Aikman, Dugger, Ind.
E. T. Aikman, Sydney, Ohio.
Myra, Aikman, Sydney, Ohio.
John W. Aikman, Sidney, Ohio.
Robert Aikman, Fort Scott, Kansas.
T. T. Pringel, Bloomfield, Ind.
Amy Pringel, Bloomfield, Ind.

On motion it was unanimously decided that all male members of the family, including those men who had married into the family, be assessed *one dollar* per year to defray the necessary expenses of the regular annual reunions.

A unanimous vote of thanks was tendered the following members for their historical contributions to this gathering, all of which are herein published.

Hon. Barton Scott Aikman prepared and read a paper, the facts of which were gathered from various Aikmans throughout the country, and especially the ancient history as contributed by the Rev. Wm. Aikman, D. D., of Atlantic City, New Jersey.

It was the unanimous voice of this meeting that every member extend hearty thanks to the Rev. William Aikman, D. D., for the great interest he displayed in sending the valuable historical matter as herein published, and it was requested that the prayers of all present be sent to the Father of all, asking that He prolong this useful life so it may be present in person or communication at our next family reunion.

A communication was read announcing the death of Willis Aikman, of Marion, Illinois, who was the son of Samuel Aikman, brother of John Aikman, and being the last one to die of a family of fifteen children, and whose death blots out one entire generation.

Expression of sympathy upon the death of Willis Aikman, who expected to be present at this reunion:

WHEREAS, It has pleased the All-Wise Providence to remove from our midst Cousin Willis Aikman; therefore be it

Resolved, That in the death of Mr. Aikman we lose a worthy member of our family, a true friend and a good citizen.

Resolved, That the sympathy of this reunion be extended to his bereaved family, and a copy of these resolutions be forwarded to his family.

Respectfully submitted,

WM. TAYLOR, Dana, Ind.
PETER AIKMAN, Dana, Ind.
L. C. AIKMAN, Washington, Ind.
Committee.

On motion, the following committee was appointed by the president to arrange for a suitable monument to be placed over the grave of John Aikman, who was buried at Washington,

Indiana: Committee—John B. Aikman, Terre Haute, Ind.; Alonzo Helphenstine, Washington, Ind.; Louis C. Aikman, Washington, Ind.

On motion it was unanimously decided that the next reunion shall take place in the city of Terre Haute, Indiana, during the month of September, 1906, the date to be determined later on by the officers of the organization, notices of same to be mailed to all Aikmans whose addresses are known.

Grace Aikman Bryant, who was elected assistant secretary, was requested to assist in arranging for the next reunion.

On motion, Wm. H. Aikman was reimbursed for the expenses he had incurred necessary to this gathering, and he was further authorized to compile all the data and proceedings of this reunion and have same printed and mailed to all members of the Aikman family, expense of same to be paid from the one dollar assessment as levied.

Letters were received from the following members of the Aikman family, extending their congratulations to the Aikman family assembled:

Wm. O. Aikman, Cazenovia, N. Y.
Telegram and letter from Alex. Aikman, Los Angeles, Cal.
Rev. S. S. Aikman, Greenfield, Ohio.
Rev. T. M. Aikman, Rulo, Nebraska.
Mary D. Aikman, Washington, Ind.
Chas. C. Aikman, Washington, Ind.
E. Allen Wood, Brooklyn, N. Y.
Walter M. Aikman, Sr., New York.
Robert S. Aikman, New York.
Walter D. Aikman, Brooklyn, N. Y.
E. Hazard Aikman, New York.
P. Aikman, Chicago, Ills.
J. M. Aikman, Marion, Ills.
Wm. Aikman, Pittsburg, Pa.
Dr. W. H. Aikman, Natchez, Miss.
D. A. Clements, Kansas City, Mo.
Thos. J. Strickler, Lawrence, Kans.
Wm. M. Aikman, Jr., Newark, N. J.
Junia H. Lillie, Chattanooga, Tenn.
Rev. William Aikman, D. D., Atlantic City, N. J.
Ed Aikman, Bedford, Ind.
Miss E. J. Aikman, South Framingham, Mass.

BIOGRAPHICAL SKETCH OF JOHN AIKMAN'S DESCENDANTS

Prepared by L. C. Aikman, Washington, Ind.

Descendants of John Aikman, who was the father of thirteen children, as follows:

Barton S. Aikman.
Born Oct. 17th, 1805.

As to his children, refer to B. S. Aikman's letter, which is printed in this report.

Sicily Roberson.
Born Dec. 11th, 1808.

Family in Davies county, Missouri, have no report.

James Aikman.
Born Jan. 7th, 1810.

Children—

Mrs. Della Coleman, Topeka, Kans.
Samuel Aikman, Washington, Ind.
John Aikman, Washington, Ind.
Henry Aikman, Washington, Ind.
Mattie Aikman, Washington, Ind.

Hugh Aikman.
Born in a fort at Washington, Ind., March 12th, 1812, being the first white child born in Davies county, Ind.

Children—

Mary Waller, dead.
Arch Aikman, dead.
John Aikman, dead.
L. C. Aikman, Washington, Ind.

Samuel Aikman.
Born Feb. 14th, 1814.

Children—

All in Vermilion county, Ind.

John B. Aikman.
Born June 15th, 1816.

Children—

None living.

Thomas Aikman.

Born May 5th, 1818; died in boyhood.

Elizabeth Hawkins.

Born Jan. 3rd, 1821.

Children—

John A. Hawkins, Newberry, Ind.
Arch A. Hawkins, Newberry, Ind.

Maria Helphinstine, Indianapolis, Ind.

Born Nov. 23rd, 1822.

Children—

William Helphinstine, Indianapolis, Ind.
Lou Helphinstine, Washington, Ind.
John Helphinstine, Washington, Ind.

Mary McCormick.

Born May 11th, 1825.

Children—

Mrs. Lucy Corning, Washington, Ind.
Mrs. T. T. Pringle, Bloomfield, Ind.

Robert Aikman.

Born June 1st, 1827.

Children—

Mrs. Chas. Jones, Washington, Ind.

William M. Aikman.

Born May 27th, 1830.

Children—

Dr. W. H. Aikman, Natchez, Miss.
Helen Molton, West Arrensburg, Ills.
Mary D. Aikman, Washington, Ind.
Laura G. Aikman, Chicago, Ills.
Walter V. Aikman, Chicago, Ills.

Martha Johnson.

Born Oct. 7th, 1832.

This is the only living child of John Aikman. She lives in Topeka, Kansas, and has family, but we have no report as to number or names.

LETTER READ BY

THE HON. BARTON SCOTT AIKMAN

OF NEWPORT, IND.

John Aikman was born May 5, 1783, and Mary Barr was born April 15, 1787. They were both Virginians, and were born either Virginia or Kentucky. They were married June 14, 1804. While living in Kentucky, they had born to them the following children: Barton Stone Aikman, born October 17, 1805; Sicily Aikman, born December 11, 1808; James Aikman, born January 7, 1810. With these three children, John Aikman and his wife moved from Bourbon county, Kentucky, to Davies county, Indiana, in 1811, and there were born to them in Davies county the following children: Hugh Aikman, the first white child born in Davies county, born March 12, 1812; Samuel Aikman, born February 28, 1814; John B. Aikman, born January 15, 1816; Thomas Aikman, born May 5, 1818; Elizabeth Aikman, born January 3, 1821; Mariah Aikman, born November 23, 1822; Mary Aikman, born May 1, 1825; Robert Aikman, born June 1, 1827; William M. Aikman, born March 27, 1830, and Martha Aikman, born October 7, 1832.

Barton Stone Aikman, the eldest of these children, came from Davies county to Vermilion county in about the year 1827. He was married to Jane Rhoades October 17, 1827, the day he was 22 years of age. There were born to this union the following children: John, Mary, Elizabeth, William, Silas, Mariah, Robert and James—Mariah and Robert being the only ones now living.

After the death of this first wife, he was again married to Mary Jane Amerman on March 10, 1846. From this union the following children were born: Peter, Thomas, Hugh, Franklin, Margaret, Edgar, Samuel, Harry M. and Barton S. Aikman, all of whom except Margaret are now living. Barton Stone Aikman and his last wife are now both dead.

Sicily Aikman intermarried with a man by the name of Robinson, and moved to Davies county, Mo., where quite a large family of Aikmans now reside.

James Aikman, now dead, has descendants in Davies county, his children being Henry, John, Samuel and Martha, and Mrs. Coleman, of Topeka, Kans.

The descendants of Hugh I will leave for others to record who are familiar with the facts.

Samuel Aikman was married in Davies county, in August, 1833, to Eliza Ann Eades, a cousin of the noted Captain Eades, and shortly after settled in Vermilion county. There were born to them the following children: John, Mary, Elijah, Martha, Margaret, Lucy, Caroline, William, Levi H., Charles C., Lemuel and Adelaide, of whom only Carrie M. Taylor, Adaline Westbrook, Levi H. and Chas. C. Aikman and Lucy Hooker now survive.

John B. Aikman died in Davies county many years ago, and now has one grandson in Terre Haute, Indiana, John B. Aikman.

Thomas Aikman died when a small boy.

Elizabeth Aikman married a Hawkins and moved to Greene county.

Maria Aikman married a Helphinstine, and lived in Davies county, where her descendants are now found.

Mary Aikman married Captain Isaac McCormick. She left two daughters—Mrs. Corning, of Washington, and Mrs. Pringle, of Bloomfield.

Robert Aikman has been dead many years, and has one child living, Mrs. Chas. Jones, of Washington.

William M. Aikman has five children living—Walter, Helen and Laura, of Chicago, and Mary at Washington, and William at Natchez, Miss.

Martha Aikman married a Johnson, and now resides in Kansas, and she is now the only living child of John Aikman.

It is my province especially to speak of the two families that settled in Vermilion county, the families of Barton S. and Samuel Aikman, and leave the history of the other children of our grandfather to those more conversant with the facts. Barton and Samuel Aikman were two of the early pioneers of Vermilion county. My grandfather, John Aikman, came to this county with these two sons in about the year 1830 to find them a home. The public records of our county show that John Aikman made the original entry of a large tract of wild prairie and timber land, which he afterward deeded to these two sons, giving them a start in life, when he returned to his old home in Davies county. A hero of the wilds and the wilderness himself, with a father's care, love and devotion to his

children, he bravely led these two sons where they followed and planted for each a home, and with the parting blessing of their father, they each began the battle of life in the primeval forest and untrodden waste of prairie. Here they battled and toiled, and by their industry, frugality and perseverance builded for their posterity, not only a rich heritage of lands, but a richer heritage of devotion and nobility. Samuel died of a ripe old age, and Barton died in middle life. And the memory of each is honored and respected, not only by a long line of descendants, but by the community in which they lived.

The names of the descendants of these two Aikmans are too numerous to record in this paper They are all over Vermilion county, and some are elsewhere. But they come to this reunion ready to give an account. Without boasting, they bring the name "Aikman" back to you in honor. And we bring our spokesman with us—we have here our dear aunt—Eliza, widow of Samuel Aikman, 91 years old last Saturday—and you may ask her if we have not all been good.

To the children of Barton S. Aikman this is a day of especial significance. Unwittingly, this first reunion was fixed for October 17, 1905, by our cousin, William H. Aikman, of this city. Just 100 years ago today, my father was born. This is the centennial of his birth, a happy day. One hundred years ago today there was joy in that old Kentucky home, the home of that old pioneer, John Aikman, the advent of his first born. And is it not especially appropriate that the first reunion of the descendants of that noble ancestor should be upon the centennial of the birth of the first of those descendants?

And what just cause for pride we have as the descendants of that grand old man? We should be proud to bear his name; he was a nobleman, a prince, and his name a precious memory and the story of his life an inspiration to us all. You have all read the recent press comments of his life and character, and you know the story. From the wilds of Kentucky to the wilds of Indiana, five years before the State of Indiana was admitted as a State into the Union. During the Indian wars, when his home and loved ones had to be guarded, not only against wild beasts, but against wild and savage red men, he was compelled in his early life, in what is now Davies county, to build a fort in which to shelter his family against the ravages of Indians. And in one of these forts his son Hugh was

born. He was Davies county's first school teacher, one of its first commissioners, and on the first grand jury that met in the county. He built the first brick house in the county, in 1833, making the brick himself, tramping the mud with oxen. The old house still stands and is occupied by the blood of its builder. What a monument Grave stones may crumble, the family record may grow yellow with age, and his descendants may forget, but the civilization whose foundation his faithful hands helped lay will stand as his memorial for all time

But this is not only a John Aikman reunion, but an Aikman reunion. From the best information obtainable, the father of this old pioneer, John Aikman, was one Adam Aikman, who had at least two sons—one our John and the other Samuel, whose son now lives at Marion, Ills. If he is here, he can speak for himself. The name of this son is Willis Aikman, who is the only survivor of fifteen children of this Samuel Aikman. A large colony of Aikmans live at Marion, Ills.

WILLIS AIKMAN DIED SINCE THIS LETTER WAS WRITTEN

SEE EXPRESSION OF CONDOLENCE TO HIS FAMILY AS PASSED BY THIS MEETING

It may be of interest to speak of a few facts concerning something of our collateral kindred, who are most certainly of our own flesh and blood, but whose ancestry can not be traced to our own.

We are probably related to these Aikmans, but the link must yet be traced. We read of Aikmans in "Alibone's Dictionary of Authors," and in a book entitled "Who's Who in America," and in "Appleton's Cyclopedia of American Authors," and in "Gorton's Biographical Dictionary," but who are they? They tell us of an Alex. Aikman, born in Scotland in 1738; went to Charleston, S. C., and at the beginning of the American Revo-

lution went to Jamaica, and became a journalist and author. writing for magazines and publishing several books, the last of which is entitled "Heavenly Recognition," published in 1783. And they tell us of a William Aikman, of Scotland, a great portrait painter, an intimate friend of Swift, Arbuthnot, Summerville and the rest, and is mentioned by them in their books of poetry. He painted portraits of kings and queens, and these portraits are now owned by the Duke of Devonshire. He died in 1731. And so it goes. But they all trace back to old Scotland. They are all of Presbyterian inclinations, and we are all kin, for here we have the story, the old, old story, dating back to 1050, when the Aikmans first started.

We hear of Aikmans in Ontario, Can., and in Kansas and various other places. We are all of this same old Scottish ancestry without doubt. Wherever you hear of Aikmans, you hear the same old familiar Aikman names—John, James, Samuel, Robert, William, Hugh—from the Huguenot blood in our veins. The evidence is convincing. Here is our hand to-day to every Aikman upon the earth. And let our hearts also unite.

I must close. You are anxious, as well as I, to hear from others. Let this day be a happy one. Let it live in memory. Let us all rejoice as we mingle together in the spirit of love. And let the remembrance of an honorable ancestry be an inspiration to an honorable posterity, so that the work of our fathers and mothers, the labor of their hands, and their devotion to us shall not have been in vain.

BARTON SCOTT AIKMAN.

DERIVATION OF THE NAME AIKMAN

AS FURNISHED THE MEETING BY REV. WM. AIKMAN OF ATLANTIC CITY, N. J.

The surname Aikman is of great antiquity in Scotland. Its origin goes back to the time of Maccabaeus or Macbeth, A. D. 1050.

Sir Robert Douglas gives the origin of the Aikman cognomen in his *"Baronage of Scotland,"* which bears the title, "The Baronage of Scotland, Containing an Historical and Genealogical Account of that Kingdom from the Public Records of the Country, the Records of Private Writings of Families and the

Works of the Best Historians. Edinburgh, 1795, by Sir Robert Douglas." In this work Sir Robert says that the name was first borne by the commander of the troops that attacked the usurper, Macbeth, before his castle, Dunsinane.

The story is given in an early, perhaps the earliest, history of Scotland, written by Boece or Boethius. Some years since and after a good many years of diligent search and inquiry, I was fortunate enough to find a copy of this very rare and valuable work, probably the only copy in this country, in the Ridgeway branch of the public library of Philadelphia. Its title is "Scotorum Historiae, a Prima Gentis Original," etc., Lib. XIX. Hector's Boethis Deidonans Auctore * * * nunc primum emittentur, Parisiis, 1574." The first edition of the work was published in 1526-4 to. This second edition was the one which I was at last able to see and consult.

Shakespeare, who died nearly a hundred years (1616) after the publication of this history, most probably derived his play of "Macbeth" from a translation of this history of Boethius.

As bearing on our family history and as a matter of literary and historic interest, I will give the story as it is related in this old chronicle. The thane, Macbeth, or, as he is uniformly called by Boethius, Maccabaeus, had, at the instigation of his wife, murdered Duncan, the king, and had seized and held the throne of Scotland for some sixteen years. To make himself secure, he selected the commanding hill of Dunsinane, in the neighborhood of the woods of Birnam. Here he built a strong castle.

In a discusive way, the old chronicle follows the history of Macbeth up to the time when Malcom, the son of the murdered king, determines to recover his father's throne. He enlisted the aid of Edward, king of England, hiring ten thousand Northumberlain troops from him, and advanced against Macbeth.

The usurper led out his forces and took his stand in front of his castle. His native bravery and resolution were reinforced by a prophecy made years before, that he could not be slain by any man born of woman, or, as Shakespeare gives the words of the soothsayer:

"Be bloody, bold
And resolute, laugh scorn to man,
For none of woman born shall harm Macbeth."

This was made stronger by another prophecy with a seeming impossibility equally great, that he would be secure on his throne till the woods of Birnam should leave their place and come to his castle.

"Macbeth shall never vanquished be until
Great Birnam wood to high Dunsinane hill
Shall come against him."—*Macbeth, Act IV, Sc. I.*

The rest of the tale I give in a literal translation of the Latin of Bocce: "But the prophecies by which he had been convinced that he could not be vanquished till Birnam wood should be carried to Dunsinane overtook the man. He was persuaded that even then death could not threaten him, since the soothsayers had predicted that he could be slain by no man that had been born. * * *

"Malcom, following Macbeth quickly as possible, the day before the victory was possible, encamped with his army in Birnam wood. There, when they had rested awhile and refreshed themselves, he ordered all to go out of the wood and each man to pluck down as large a branch as he could carry and to commence in the first watch of the night. Then with branches raised aloft to pass the intervening space and, at the earliest dawn to come into the sight of the enemy.

"When Macbeth had seen them he was alarmed at the novel sight, and especially at its meaning interpreted by the prophecies about himself. Nevertheless he led out his soldiers, yet with a spirit that boded no good.

"Scarcely had the squadrons, with the boughs thrown away, run together, when the army scattered itself in flight. When the soldiers saw this, they, in fear and unwilling to throw away their lives, appeared at once to be on Malcom's side.

"Macduff, with a personal hatred of Macbeth, had come close to Dunsinane, while Malcom was threatening him behind.

"Leaping from his horse he cried, 'Why, unfortunate man, do you follow me, who cannot be slain by any man that is born? Come on, that I may give the reward of so great a task.' Macduff, leaping quickly from his horse, cried out, 'Nay, rather, to-day shall you suffer the penalty of your crimes against all men, as you shall die by my right hand.' As he said this, with his sword he struck off the head of Macbeth and bore it on a pole to Malcom. This was the end of Macbeth in the sixteenth year of his reign."

Adopting the tradition which Sir Robert Douglas gives as it would appear that King Malcom or the commander to whom the attack was committed was the first AIKMAN. Whoever he was, the success of the stratagem of Birnam oak woods gave him his surname, Oakman or Aikman. *From him all we Aikmans are said to have descended.*

I do not vouch for the truth of this tradition which connects our name with this story, for even Sir Robert prudently says, "Having seen none of the old writings of the family, we cannot trace their descent from their origin." We Aikmans, to-day assembled here, may safely challenge any one to disprove our claim that our name goes back to this scene of battle, nine hundred years ago!

The form of the word Aikman is an old Saxon form of Oakman. In a "Ballad Book," edited by William Allingham, I find a ballad entitled, "WALY, WALY," whose first verse reads:

"O Waly, Waly, up the bank,
O Waly, Waly, down the brae,
O Waly, Waly, you burn-side
Where I and my love we're want to gae!
I leaned my back unto an *Aik*,
I thocht it was a trustie tree;
But first it bowed and syne it brak;—
Sae my true love did litchtlie me."

The sylable *Aik* is the Saxon *ae* and both are forms of the word *Oak*. Surnames have always been derived from characteristics or incidents in the history of the person to whom it was first applied, and it can readily be supposed that this was true of the first Aik or Oakman. So the Macbeth duel easily becomes an incident of our family history and gives us our name.

The Oak has a dominating place in the Aikman coat of arms. The crest over the shield is an Oak tree. On the white ground of the shield is an oak branch springing out of a baton held by a left hand and arm issuing out of a cloud, while under the whole is the legend or motto:

SUB ROBORE VIRTUS—*Valor under Oak.*

From all these things it would seem quite clear that in some way the name Aikman is connected with the oak. Whether this was from the sturdy and strong character of our progenitor

or from the fight between Macbeth and Macduff, in which Birnam oak wood bore so picturesque a part, it is now, after these nearly a thousand years, impossible to affirm.

Douglass, in the book already quoted from, says that Alexander de Aikman was compelled to submit to King Edward I of England, when he overran Scotland in the year 1296. He adds, "The ancestors of the family appear to have been free barons, and to have settled in the county of Forfar several centuries ago." It is a very remarkable fact that Aikmans are now, as they have been for seven or eight centuries or more, residing still in Forfarshire. Representatives of the immediate family of this writer are, or were a few years ago, still residing in Forfarshire, whence his grandfather came more than a century and a quarter ago.

Books of heraldry speak of the Aikman coat of arms as one of the oldest in Scotland.

Very probably these "free barons" were a race of hardy men, who yielded reluctant obedience to higher authority and were accustomed to rely upon their good claymors for the defence of their rights and the sanctity of their homes. If independence of thought and action are in any way characteristic of the family, perhaps it may be traced to these barons in that far-back time.

In any case, we may, in this gathering of Aikmans, take pride in the belief that under the fostering care of the Great God whom the generations of Aikman have reverenced and served in this and in our fatherland, no man can point out an instance where an Aikman has been convicted of a crime or has ever made us ashamed of the name we bear. May it—so we pray—be so in all the coming time.

Rev. William Aikman, D. D.,
Atlantic City, N. J.

A poem by Rev. T. M. Aikman of Rulo, Nebraska, written on his return to Indiana after an absence of several years.

TO THE WABASH RIVER

After long absence, O beautiful river, I return to thee,
But many are the changes that time brings to me,
Enchanted vale of the Wabash the land of my birth,
More dear to my heart than any spot on earth.

Flow on bright waters soon the Ohio river you will meet,
For sweeter to me is the love of my kindred and friends that I greet.
I seem to hear even now, through the rippling roar,
Kind voices I heard but will hear in this world no more.

Tears will unbidden start when in sorrow I think
Of loved ones who gathered flowers on thy brink,
And plucked the bright blossoms from the trees overhead,
But alas! some of my dear ones are with the silent dead.

There are vacant chairs of precious ones that loved me in days of yore,
They have crossed the mystic river to immortality's shore;
Flow on crystal waves in your journey to the sea,
Like the spirits of the departed you will never return to me.

My friends that crossed the mystic river are happy on a far-off shore,
But they will never, never come back to me any more,
But some day that land that is very far off my eyes shall see
For the King is preparing a mansion over there near my friends for me.

—T. M. AIKMAN.

A tribute to an Aikman from *The West Jersey Presbyterian*:

REV. WILLIAM AIKMAN, D. D.

It is with pleasure that we present our readers with a sketch of a highly esteemed member of our Presbytery, Dr. William Aikman.

William Aikman was born in New York city August 12th, 1824, of Scotch, Huguenot and Dutch ancestry; his forebears on his mother's side, coming to that city about 1720, and on his father's side about 1780. The Aikman family belongs to one of the oldest of the Scottish baronetcies, going back to the year 1050 A. D., the families still residing in Forfarshire, Scot-

land, where they have held possessions for over seven hundred years.

Dr. Aikman's ancestors have been ruling elders in the Presbyterian church, "the memory of man not running contrary thereto." His father, his uncle and grandfather were ruling elders at the same time, and in the same church—the Pearl Street Presbyterian Church, of New York, where Dr. Aikman was baptized, and with which he united by profession of faith in his fifteenth year.

Dr. Aikman was prepared for college at an academy in New York, and entered the New York University in the fall of 1842. He was graduated with honor—the English salutatory—in 1846. He entered Union Theological Seminary the same year and was graduated in 1849. He was licensed to preach by the Fourth Presbytery of New York, and was ordained by the Presbytery of Newark at his installation over the Sixth Presbyterian Church of Newark, N. J., December, 1849. He remained pastor of this church until his call to the Hanover church, Wilmington, Del., in the spring of 1857. In 1869 he was called to the Spring Street Presbyterian church, New York. In 1872 he was called to the Westminster church, Detroit, Mich. In 1877 he was called to Aurora, N. Y. In 1881 a nearly fatal illness compelled his resignation. In making his recovery, he came to Atlantic City, and in the summer of 1883 was called to the First Presbyterian church. After holding the call under consideration for six months, he accepted it and was installed pastor April, 1884. He continued pastor until his resignation in 1894.

He received the degree of Doctor of Divinity from his *alma mater,* the New York University, in 1869. He was moderator of the Synod of Pennsylvania at its meeting in Washington, D. C., in 1863, and, as moderator, presented, in a brief address, the Synod to President Lincoln when the Synod paid its respects to the President in the White House.

Dr. Aikman was the author of the "Personal letter which was addressed by the General Assembly of the Presbyterian church (N. S.) meeting in Syracuse, in 1861, "Expressing in a more personal manner" to President Lincoln "the sentiments of the church in reference to himself and the great issues with which he was called to deal." This letter made a deep impres-

sion at the time, and has since passed into the history of the church. (See Presbyterian Memorial Volume, pp. 86, 87.) Dr. Aikman has been many times a commissioner to the General Assembly, and has had a prominent part in its proceedings.

Being a pastor in Delaware, then a slave State, from 1857 to 1869, and a pronounced and emphatic anti-slavery and Union man, Dr. Aikman had much to do with the history of that State during the exciting and trying times before the civil war, when it was coming on, during its progress and in the days of "reconstructon." In 1864, Dr. Aikman, in conjunction with Mr. Binghart, a prominent citizen of Wilmington, was appointed by the Governor of Delaware to go to the front and look after the welfare of the Delaware soldiers. He organized a hospital in an Episcopal church in Fredricksburg, and was there caring for the sick and wounded during the bloody battles of Spotsylvania Court House and Wilderness, and until the place was evacuated by the Union forces.

Dr. Aikman has, during all his ministerial life, written for the public press. The list of his more prominent publications is given by "Allibone's Dictionary of Authors." Supplement by Kirk (Vol. 1, p. 17), and by "Who's Who in America," as follows: Our Country Strong in its Isolation, 1851; Seductive Power of the Romish Ritual; Government and Administration; The Moral Power of the Sea, Phila., 1864, 12 mo.; Life at Home, or the Family and its Members, N. Y., 1870, 12 mo.; The Altar in the House, N. Y., 1876, 12 mo.; Heavenly Recognitions, sq. 12 mo., N. Y.; Talks on Married Life and Things Adjacent, N. Y., 1884.

Dr. Aikman married July 25, 1849, Anna Matilda Burns, who, with her parents, was born of Scotch-Irish parentage in New York city. They have had four sons and three daughters, four of whom are living in New York, Detroit and Atlantic City. Dr. Aikman and his wife celebrated their fiftieth wedding anniversary in 1899, and are now living in their home on States avenue, Atlantic City.

In his 81st year, Dr. Aikman is still engaged actively in ministerial and philanthropic work; has been president of a local branch of the N. J. Society for Homeless Children for six or eight years; has been for over five years probation officer for Atlantic county, N. J.; has had charge for over a year of the

mid-week prayer meeting of the First Presbyterian of Atlantic City; preaching and lecturing more than an average of once every week; a member of various State organizations engaged in penal and reformatory work in this State. It is difficult to find Dr. Aikman's equal.

LETTER FROM ROBERT S. AIKMAN
OF BROOKLYN, N. Y.

The following account was found written in a memorandum book of the late Robert Speir Aikman, born December 27th, 1825, died March 17th, 1902, who was the seventh child of Hugh and Ann Finley Aikman:

"My great grandfather, Robert Aikman, was a native of Falkirk, Sterling Co., Scotland. He was a stone mason and small farmer, owning a few acres of land and two stone houses.

"He was an elder in the Presbyterian church, and so was his father and grandfather. His wife's maiden name was Mitchell. They had six sons and two daughters, Mary and Margaret. Mary married a Mr. Cowie, and Margaret wed Mr. Leishman, and both couples continued to reside in their native place.

"John was the youngest son and the only one who survived the age of childhood; he was born August, 1758; died 1833. His father died during his childhood; he learned the trade of a shipwright, and having completed his apprenticeship he went on a voyage from Greenock, Scotland, to the Island of Jamaica, and soon after his return home went on another voyage to the same place.

"The vessel in which he sailed was captured on her voyage out by an American armed vessel, about the year 1780, during the Revolutionary war. He was carried into Boston; from there he went in a vessel bound for Charleston, S. C. He was again captured and brought to New York, then in possession of the British. Here he remained and worked at his trade and married his first wife, Ann Marion Speir. She was the daughter of Hugh Speir, a cabinet maker, who left his native city of Glasgow, Scotland, in the spring of 1775 or 6 with a family consisting of his wife and four sons, named John, Hugh, James and Robert, and the daughter, Ann Marion.

"Hugh Speir died about 1783 or 4, and was buried in the ground of the 'Brick church,' N. Y. He was descended from

Robt. Speir, a French Huguenot, who fled with his family from his native land, France, on the revocation of the edict of Nantz, and settled in Scotland. His wife's name (maiden) was Sproul. She survived her husband and died in New York city in 1810 at 73 years of age. After the death of Hugh Speir, his eldest son, John, managed the estate of the family, which was sold and with the proceeds the widow and children removed to Shelburn, in Nova Scotia, and my grandfather, John Aikman, followed and there married Ann Marion Speir, his first wife, in 1785 or 1786. There the first and second child were born, my uncle, Robert, and my father, Hugh Aikman, (first child, Robert) May 7, 1787, and (second child, Hugh) July 11th, 1790. Finding the climate uncongenial, they soon after removed to New York city in April, 1792, and the widow of Hugh Speir, with her family, came with them.

"They became members of the Scotch Presbyterian church, Rev. John Mason, Wall St., N. Y. He was succeeded by his son, John Mitchell Mason.

"In 1793, the first daughter, Mary, was born. She died 1794. The second, Mary, was born in February, 1796, and was married to Mr. John Stewart in 1813, who died the same year. The third son, John, died in childhood. James, the fourth son, was born December, 1802. He was married in New York to Miss Dorothy, and about 1840 moved to Algiers, opposite New Orleans, La. Mrs. Ann M.'s father and mother died in New York city May 2nd, 1808, and in May, 1810, grandfather married the widow, Abigal Worden, who survived him many years.

"In the spring of 1798, a colony from the church of which my grandfather and his family were members, formed a new congregation and erected a house of worship in Pearl street, near Broadway, New York. His family, with his mother-in-law, united and grandfather was chosen elder.

"Uncle Robt. and my father became members, and also ruling elders. Grandfather died August, 1833, and his second wife died October, 1852. Most all of my father's children were baptized in that church, and, with one or two exceptions, all became members. ROBT. S. AIKMAN."

The above is copied from some of my father's papers. Joseph West, my grandfather, died March 20, 1825.

CLOSING REMARKS

Crowned with a halo of success and happiness, the first Aikman family reunion has come to an end, but the end has proven mightier than the beginning, for it has left an organization so firmly established that its members feel it will never die until the earth dies and God summons all to their eternal home, to the heavenly progressiveness. When one takes into consideration the congenial, sociable and noble natures of the Aikman descendants, then one is not at all surprised that the first meeting was a large success.

The energy and determination of the Aikmans is proverbial—and it will not rest until it gathers in at the next September meeting every member of the tribe that is within reach. May our merciful Father spare all those who were present at our first meeting, in order that they may see an enormous increase of attendance at the second Aikman family reunion.

DR. ROBT. AIKMAN, President.
WM. H. AIKMAN, Secretary.
Indianapolis, Ind.

No. 37412

IN THE SUPREME COURT OF THE STATE OF KANSAS

In the Matter of the Last Will and Testament and Trust Estate of Sarah Denton, Deceased.

Orville R. Aikman, Louis Pearl Aikman, Olan E. Aikman, Harold F. Aikman, Daisy Aikman, Madge E. Aikman, Sylvia L. Hoereth, Minnie Ettie Kiger, Alva E. Sheely, George W. Sheely, and Lenora Sheely,
Appellants,

vs.

Roy F. Baker and E. F. Keene, Trustees under the will of Sarah Denton, deceased; the Attorney General of the State of Kansas, and John B. Lund,
Appellees.

Appeal from the
District Court of Republic County, Kansas.

Hon. Clarence Paulsen, Judge Pro Tem.

BRIEF OF APPELLANTS.

N. J. WARD,
Belleville, Kansas,
Attorney for Appellants.

KANSAS LAW PUB. CO., TOPEKA

TABLE OF CASES.

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District Court of Republic County, Kansas.

Hon. Clarence Paulsen, Judge Pro Tem.

BRIEF OF APPELLANTS.

NATURE OF ACTION.

This suit is to terminate the administration of testamentary trustees, and have property delivered to the heirs of the decedent.

QUESTIONS INVOLVED.

1. Should certain time limitations be computed from the admission of the will to probate, or one year thereafter, or when the trustees qualified?

2. Were the trust provisions suspended until the trustees qualified?

3. Should not the gift of the hall have been accepted by the city within a reasonable time?

4. Does not the failure of the city to accept the hall defeat the gift of the hall?

5. Could the city have accepted and then operated the hall given under the will?

6. Is the gift to the trustees to use the assets for those in need a valid gift?

7. Does not the will permit the trustees to use the trust funds for charitable and non-charitable purposes, and because thereof is invalid?

8. Did not the District Court exceed its jurisdiction in ordering the sale of the land, while the trust estate was under the jurisdiction of the Probate Court?

9. Is it not now impossible or impracticable to carry out the trust provisions under the terms of the will?

10. Should not the trustees be required to make their final accounting and deliver the assets to the heirs of the decedent?

STATEMENT OF FACTS.

Findings of fact and conclusions of law were made by the trial court, but as a matter of fact there are no controversies as to the material facts involved. Sarah Denton died October, 1934, leaving a will, which was soon admitted to probate, and her executor qualified and published his notices in the same month, and which will gave him certain trust powers, and he was to turn over the assets to the three trustees named for certain purposes stated. The trustees did not take over these assets until June, 1940, and are still holding these assets except for a few dollars paid over to a local church, and for administration expenses. The trust provisions require the handling and sale of certain real estate, and the use of the assets to build a city hall, if the city would agree to accept and maintain the same, "for church and school purposes of all kinds, for civic entertainments and such other uses of said City of Narka, Kansas, through its governing officials shall determine from time to time, fitting and proper and within the law governing such places owned by the city of a class to which it now belongs or may hereafter become." (Abst. 77) Other assets and those to be used for the hall, if not accepted, or if the trustees determine not to build the hall, are to be used by the trustees to aid the needy and worthy in the community of Narka, and to aid worthy young men and women in obtaining an education. (Abst. 77-78) The will limits these trust funds for the aid purposes, if the hall is built, to the expenditure annually

of 1/10th of the principal, and if the hall is not built, to 1/15th, and all to be consumed "within a period of not less than 20 years." (Abst. 78-79)

No action was ever taken by the city to accept the hall, the hall was never built and no funds were ever used for the aid purposes, and this proceeding was started on February 15, 1946, in the Probate Court to terminate this trusteeship and have the funds turned to the heirs, these appellants. (Abst. 4 to 8) The Attorney General filed an answer to the petition, and then the trustees had the matter transferred to the District Court. (Abst. 9 to 13) The trustees filed their answer and issues were formed as to the questions involved in this case.

On September 14, 1945, the trustees filed in the District Court a petition for authority to sell the real estate for less than $150.00 per acre, the minimum price fixed under the will of the testator. No notice was given of this hearing, but the city of Narka and the County Attorney acknowledged notice of the suit; and then the District Court authorized such sale to be had for not less than $6000.00. (Abst. 71 to 74) The land was sold for $6250.00 to John P. Lund, who was made party to the present suit, and filed an answer as owner of the land sold. (Abst. 15 to 18) In reply the heirs alleged that such sale was invalid, for the reason that the District Court had no jurisdiction to order the sale. (Abst. 20-21)

The trustees made annual reports to the Probate Court from the time they qualified until the time of this trial which was had in November, 1947; and in fact, subsequently made a report on January 22, 1948, showing that they had then on hands $11,145.81, which includes the proceeds from the land. (Abst. 3-4)

It was conceded that the city took no formal action accepting the hall, and that the hall was never built, and that the money was never used for any of the trust purposes, except on the gift to the local church, and that the earnings from $200.00 was used to buy flowers for the Denton lot in the cemetery. See Dr. Keene's testimony. (Abst. 35-36)

The trustees and Lund offered some evidence to justify the sale of the land at the price received and to show that the then city officials *might* accept the hall, if it proved to be satisfactory after constructed by the trustees. (Abst. 44 to 51) Evidence was also offered as to certain young people who would have been glad for some aid to go to high school and college. (Abst. 52 to 54) The trial court made findings of fact and conclusions of law. The appellants submitted suggested findings of fact and conclusions of law, prior to those made by the court. (Abst. 55 to 63) Also the heirs sought additional findings and to set aside findings after those were filed by the court, and also asked for a new trial and for judgment in their favor. (Abst. 63 to 71)

The first point to be considered pertains to the time when the trustees were required by the will to act, these

appellants contending they should have acted by 1935. This is important since they were first to determine whether a hall should be built. If the city failed to accept the hall, or the trustees refused to build the same then $8000.00 was available for other purposes. The city and trustees, at the trial attempted to excuse their delay by contending that since the trustees did not accept the trust until 1940, that they and the city need take no action prior thereto; and that thereafter they were excused by the war, lack of funds, high cost of materials, etc. See evidence (Abst. 40) and finding No. 16. (p. 29) Also, the time when the trustees were required to act bears on the time limitations in the will. (See pp. 78 and 79)

THE TIME PROVISIONS INVOLVED.

Sarah Denton died October 3, 1934, and her will was admitted to probate on October 9, 1934, and her executor qualified on October 10, 1934, on which date letters testamentary were issued to him by the court, and on October 11, 1934, he published his notice of appointment. The executor was ordered to transfer the assets to the trustees on April 27, 1940, which trustees qualified on June 5, 1940, and on that date received the trust property which is the subject of the present controversy. (Abst. 1 to 3) The Denton will authorized the executor to sell and make conveyance of the real property without order of court, being limited in the sale of the land to $150.00 per acre, and which sale he did not make. Subject to the powers given to the

executor all the property left by the decedent was given to the trustees for the purposes stated in the will. First, the question of the building and accepting of the hall must be determined, and we say such should have been done within a reasonable time, and not having been so done that the hall has been rejected.

The will requires that the aid provision shall be exercised within a certain time. If the building is accepted and built, then these aid provisions require the consumption of the balance of the estate within 20 years, by an annual expenditure not exceeding income plus 1/10th of the principal. If the building is not accepted and built, the 20 year limitation applies, but no more than 1/15th of the principal may be used annually for the aid purposes. (Abst. 77 to 79)

It is thus important as to when these time limitations began, to determine if it is now possible to carry out the will as contemplated by the testator.

The law applicable at the time the executor qualified required all claims to be exhibited within one year after the granting of the first letters on the estate, and which was on October 10, 1934.

Lane v. Estate of Wells, 150 Kan. 261, held, under the old code, that claims must be presented and set for hearing within a year.

However, the executor might prolong his administration, until he chose to make final settlement, unless the court otherwise ordered. See G. S. 1935, 22-904, and In Re Estate of Woodworth, 145 Kans. 870, where the stat-

utes pertaining to administrations of estates in the years 1934 and 1935 are considered. This decision upheld orders of the probate court in requiring the executor to render his accounts, and then upon appeal the district court was held to have the power to order the removal of such executor and to appoint a suitable person to handle the estate. This decision reviews the statutes and holdings of the court concerning the administrations of estates, and clearly shows that the probate court had under the old law full jurisdiction to direct and control the official acts of executors and administrators, and to require them to settle their accounts and distribute the estate. G. S. 1935, 20-1101 is set out as showing that the probate court has these powers, and there are many other statutes and decisions cited as confirming the power of the probate court and the district court on appeal, to require the administrator or executor to act in the best interests of the estate. One of the cases cited is Stratton, Adm'r. v. McCandliss, 32 Kan. 512, which held that the district court could order the probate court to discharge the administrator, because he failed to sell the real estate ordered by the probate court.

Since the probate court had jurisdiction over the executor and could require him to perform his duties as such in the administration of the estate and in the carrying out of the will, there is no doubt but that the probate court could have required such executor, after the expiration of one year, to have closed the estate and turned over the property to the trustees. Consequently

the time limitations for the trustees to act began when the will was probated or at the end of the year, unless it can be said that the failure of someone requesting, and the probate court ordering the turning over of these assets, extended the time for the carrying out of the will.

Citizen's B. & L. Ass'n. v. Knox, 146 Kan. 734, deals with a will creating a trust and the statute concerned in this case, and it was there held that the probate court as well as the district court had jurisdiction to carry out the provision of a will which creates a trust, and may appoint an executor so to do, even after the executor named in the will had been discharged twelve years previously. On page 745 it is stated that the district court could have appointed a trustee, "to carry out the trust provisions of the will in question." It is also stated on that page and the next, that:

> "There is a well-recognized distinction between the administration upon an estate, either under the law or a will, and the supervision of a trust whether created by will or not. In the administration upon an estate the executor of the will, or the administrator under the law, has the general duty of collecting the assets of the estate, paying the debts of the decedent, and making distribution of the remainder of the estate to the beneficiaries named in the will, or to those entitled to it under the law, and when he completes those duties he has performed the functions of an executor of the estate. If the will in fact creates a trust with respect to all, or certain of the property, the distribution of that part of the property should be made to the trustee whose duty it becomes to carry out the provisions of the trust."

After a thorough discussion of the subject it was held that if the district court had not taken jurisdiction to appoint the trustee to carry out the will, that the probate court might do so. Thus we have it definitely determined as applied to the present case, that the probate court or the district court upon proper application, might have ordered the trustees named in the will to take over the assets and carry out the will, at any time after the will was probated, or the expiration of the first year from the date that the executor qualified and received his letters testamentary.

Achenbach v. Baker, 151 Kan. 827 originated as an action to construe a will which contained testamentary trusts, and it was held that the court thereby took jurisdiction of the trust matters from the Probate Court, including the approval or appointment of trustees and their removal for cause. This decision again affirms that the probate court might have exercised the supervisory powers over the trust matters and the trustees, but that when the will, by consent of all parties, came before the district court, such court was then given jurisdiction to construe the will and administer the trusts.

This suit was started in August, 1938, for a construction of the will as to the charitable trust and the plaintiff alleged that she was a resident citizen and tax payer of the city to be benefited by such trust, and brought the suit on behalf of others similarly situated. Then the Attorney General intervened asking the will to be construed and the district court to take jurisdic-

tion of the trust and require that the same be carried out by trustees. Thus we have a will and a suit arising before the new probate code became effective, and on account whereof and the fact that all of the parties consented to the district court's assumption of the jurisdiction of the trust estate, this court upheld such court's jurisdiction. See discussion on page 151 in this respect. This case is important as demonstrating just how this present will could have been brought before the court for construction and enforcement by any of the citizens of Narka, or the trustees, or the Attorney General. Hence there is no excuse for the delay in the present matter from 1935. Prior to that time there were claims yet to be determined and special bequests to be paid, but at the end of the year there was no reason why the trust provisions in the will could not have been taken over by those designated in the will or someone substituted for them; and such could have been done either under the jurisdiction of the probate court or the district court.

It might be argued that since the executor was authorized to sell certain real estate, that his failure so to do extended the time for the taking over by the trustees; but, the will itself gives the trustees these powers, if not previously exercised by the executor. (Abst. 76) Besides, the powers given the executor, other than the normal administration of the estate, were trust powers. See the cases already cited and especially Knox v. Knox in 87 Kan. 381. And upon failure of

the executor-trustee to perform the trust powers given him, then such could have been performed by the three trustees named in the will, or someone substituted for them.

The trustees named in the will were the appraisers for the executor, and thus must have been informed as to their duties under the will. (Abst. 2) But even if they were not informed still the trust provisions were effective, and had they refused to act upon proper notice, then the probate court or the district court could have selected trustees in their stead. See Shive v. Hayes, 132 Kan. 137; Hollenbeck v. Lyon, 142 Kan. 352.

ANY ONE INTERESTED IN THE TRUST ESTATE COULD HAVE INVOKED THE JURISDICTION OF THE COURT.

Bogert on Trusts and Trustees, Vol. 2, Chapter 21, beginning at page 1251 deals with the subject of "power to enforce" trust provisions. It is first pointed out that generally the Attorney General is vested with the power to see that charitable trusts are set up, because the matter is of public interest. Page 1256 states that the courts have permitted other beneficial representatives to enforce the trust, and then we find on the same page:

> "So, too, where the charitable trust is for the inhabitants of a certain city, town, or village the courts have occasionally entertained jurisdiction over a suit to enforce the trust begun by the mayor of the city, or by the town or village."

At any rate, the City of Narka or other interested parties might have gone into the probate court and asked that those mentioned in the will qualify and act as trustees, or that the court appoint persons to act in their place. This principal is followed in the case of Shive v. Hayes, 132 Kan. 137, 141, where appears the following:

> "Hence, whether Leffa M. Hayes knew of the instrument creating the trust or not did not destroy the beneficial interest of the plaintiff in the instrument. If, on learning of the instrument, the trustees declined to act, the court would appoint a new trustee. See Knox v. Knox, 87 Kan. 381, 385, 124 Pac. 409, as to jurisdiction of courts over trusts."

See also Achenbach v. Baker, supra.

There is another reason why the will is to be enforced, either as of at the time of the death of the testator or the time when the trustees could have qualified, as the will speaks from the death of the testator. See In Re Estate of Ellertson, 157 Kan. 492, which held that, unless it shows a contrary intention, the will is to be construed as speaking from the time of the death of the testator, and construed as operating according to conditions then existing. As applied to the present case the trustees should have arranged for the city hall and to render aid to those in need, as defined by the will, as soon as possible after the death of Sarah Denton, in order to carry out the terms of such will in accordance with the conditions then existing. At the death of Sarah Denton and for several years there-

after, a city hall could have been built for less than one-half for which it might now be built, and likewise the aid to those entitled thereto could have been afforded to them on a similar economic basis.

When this matter was presented to the trial court the trustees assumed the position that they were called upon to do nothing in the administration of the trust duties until they qualified in 1940, and since that time they excuse their failure to carry out its provisions, because of the economic conditions existing during the war period, and because of the inflated prices resulting therefrom, and because of this present suit to terminate the trust. (Abst. 44 to 50)

In this connection it might be well to consider subdivision (h) of part "Seventh" of the will. (Abst. 78) This provides that if the city refuses to accept the memorial building under the conditions imposed or the trustees determine it to be impractical to provide such building, then the building shall not be provided. Certainly, the testator did not intend that the trustees could take their own time for qualifying, and then determine whether or not they want to carry out the provisions of the will as to the building of the hall. They should have qualified as soon as they could have taken over the property, which was not later than the end of the first year of the administration; and under those conditions the trustees should have determined whether or not the hall should be built. We contend that the hall has been rejected because of the trustees' failure to

qualify before 1940, because of the failure to build the hall, because of the city's failure to accept the hall, and because of the failure of the city or other interested parties to bring about the timely execution of the trust provisions concerning the hall.

WERE THE TRUST PROVISIONS SUSPENDED UNTIL THE TRUSTEES QUALIFIED?

This has already been discussed, but it would be well to consider Bogert on pages 461 to 465 in Vol. 1. Where there is a provision, as in the Denton will, that the trustees must give a bond before receiving the assets, Bogert points out on page 462 that such failure might prevent the trust arising, or prevent the party acting as trustee, or cause the trustee to be guilty of a breach of trust, for which he would be liable; and Bogert shows that there are authorities sustaining these different views. And that there are decisions holding that a failure to qualify "does not prevent the nominated trustee from becoming trustee if he accepts the trust, even though he pays no attention to the direction regarding oath, bond, or letters." And then Bogert concludes, page 464,

> "He is directed to take the oath, give the bond, and receive letters at the beginning of the trust, as the first acts of his administration, but he may nevertheless become a trustee without performing those acts. Not to perform the acts is a breach of his duty to the cestui which may render him liable to removal at the application of the cestui, or may cause a court to order him to supply the deficiency before going on with trust administration, but such

> neglect does not make his appointment as trustee and acceptance of the trust void. This latter view is believed to be a sensible construction of a mere direction that there shall be a bond, oath, and letters, without an express statement of any effect of the failure to take such steps."

When a will has been admitted to probate which confers trust powers on anyone, such powers immediately vest in such trustee, and unless there is some express limitation to the exercise of such trust powers, the trustee may exercise them. The case of Knox v. Knox, 87 Kan. 381, 385, pointed out that the will in question involved two trusts, one expressly created by the will which conferred powers when probated, and the other reposed in the executors by their appointment as such. Of course, a court of equity always could, and still can, construe the will and see that the trust provisions are carried out, but it does not require a court decree or the appointment of trustees to vest the trust powers in trustees, as such powers are given them by the instrument itself. So, in this present case the delay of the trustees to qualify did not suspend the trust provisions, nor excuse the building of the hall, nor its acceptance by the city, nor excuse the aiding of those entitled thereto as provided by the will.

Sarah Denton died in 1934, and her will was promptly admitted to probate, and her executor qualified and gave notice of his appointment on the 11th day of October, 1935, so that the trustees should have then begun the carrying out of the will, insofar as it could

be carried out. As stated in the Ellertson case, supra, the will is to be construed as of the time of the death of the testator, and not as of the time when the named trustees qualified and took over.

The "Seventh" part of the will states that the property not needed by the executor for administrative purposes is vested in the three named trustees, for the trust purposes stated. As soon as the will was admitted to probate the trustees had title to this property and certainly were required to proceed in the administration of the trust at a date not later than one year after the executor qualified. In fact, there is no reason appearing why they should not have been arranging their trust administration in advance of the receipt of property from the executor. The will required the trustees to use $200.00 for the upkeep of the Denton lots in the cemetery, and certainly Mrs. Denton did not intend that this should be delayed until 1940. Likewise as to the amount to go to the church, such should have been done promptly and not postponed. As to the building, the will provides that the trustees shall use $8000.00 "to purchase necessary ground and erect and equip thereon a proper building" to be used for the purposes as stated in the will. Then subdivision (g) and (h) of such will specified that, as a condition precedent, the City of Narka "shall, through the properly constituted officials, enter into an agreement with said Trustees to accept such building upon its completion and thereafter maintain the same in good condition and control the

use thereof for the purposes herein specified *** free of cost ** excepting only actual expense for fuel and lights furnished by or through the agency of said City of Narka.'' Subdivision (h) provides that if the City of Narka refuses to accept this building under these conditions, or if the trustees conclude it would be impractical to provide the building, then the building shall not be provided, and the money shall be used otherwise.

In the trial of this case the City of Narka took the position that the trustees must build the building and then the City of Narka could decide if they wanted to accept it. See abst. pages 44 and 45, especially at the bottom of pages 45 and 46, where it was stated by the attorney for the City and trustees that the City could not accept something that is not built yet. In the cross examination of the mayor of Narka he was asked if his position as mayor was that they did not have to accept the building until it was built, and he said that was right. (Abst. 46) The councilmen of the City testified to the same effect, that if a suitable building should be constructed by the trustees that they would accept it. In fact, one witness said that he would want to wait until the building was done and then he would decide what to do about accepting it. (Abst. 49) The will itself in subdivision (h) makes it clear that the City must accept the building under the conditions imposed in advance of its building and upon such refusal to accept, the money shall be used for other purposes. If the money had already been spent for a building, and

then the City refused to accept, the money would not be available for other purposes. The evidence clearly shows that the City will never accept this building in advance of its construction; and if the building is built the officials may not accept the same under the conditions set forth in the will. Of course, there may be a new set of officials from those that testified at the time of the trial. And, as urged in the objections made to this line of testimony, there can be no acceptance by the officials testifying in court. Their acceptance must be in a more formal way, probably such would have to be done by election, since this constitutes a city hall.

See G. S. 1935, 15-706, which authorizes the governing body of a city of the third class "to procure, by purchase or otherwise, a suitable site, and to build thereon permanent buildings, the same to be used for public purposes, such as meetings relating to the business of said city *** and also for other public purposes, such as political gatherings, lectures, and other entertainments whether for free use or for hire."

This section also provides:

> "That in no event shall said city officers proceed to procure said land or erect said building or buildings thereon, or appropriate any of the moneys of said city, or levy any tax therefor, without first submitting the question to a vote of the electors of said city, at a general or special election called for that purpose by the governing body."

G. S. 1935, 15-707, permits private aid in the construction of said building, that such may be built in con-

junction with some other corporation or association or organization, and be used for joint purposes. From the foregoing it is apparent that a city cannot spend any money on a public building without an election, and it may even be that they could take no action in the procuring of land for a building without an election. It may be also that a city cannot spend money for maintenance, supervision, and repairs without an election, as contemplated by subdivision (g) of the Denton will.

At any rate the city could only act in some formal way and not by the mayor and council testifying in court that they might accept the building if suitable. Root v. Topeka, 63 Kan. 129, held that an action of individual members of the council could not employ an attorney to act for the city and that:

> "They have no authority except as members of the council acting together as an organized body, and its will must be expressed by ordinance, resolution, or in such other form as is prescribed by law."

GIFT OF HALL REQUIRED ACCEPTANCE WITHIN A REASONABLE TIME.

110 A. L. R. 1354 has an annotation on the subject, and several cases are cited to the effect, that where there is a charitable trust on condition precedent, the condition must be performed within a reasonable time. Among the cases is Maguire v. Macomb, 293 Ill. 441, 127 N. E. 682, and which is discussed in 110 A. L. R. 1355. This is a case where land was given to a city for a park,

upon condition that the city within a reasonable time file its acceptance of the same and take possession of the land and improve the same for park purposes. Of course, the will required that it be accepted within a reasonable time, but the law requires such even though the will does not so provide. See 69 C. J. 972. It was held in the Maguire case, that a reasonable time is to be determined from the facts and circumstances, and is a mixed question of law and fact. This case makes it very clear that gifts of this character are upon conditions precedent; that is, the trustees under the Denton will were not required to build the hall to see if the city would accept the same, but rather the city was obligated to accept the hall as a condition precedent, and its failure to so accept within a reasonable time defeats the gift. The following statement in the Maguire case is supported by authorities: "The general rule is that a devise or bequest upon conditions precedent does not become effective until the conditions are performed."

The evidence in the Denton case by the officers, acting individually and not by ordinance or resolution, was that they would accept the hall after built if satisfactory, or words to that effect. If their acceptance of the hall upon the terms as set out in the will was a condition precedent to the gift, as clearly indicated by the terms of the will, then the trustees should not build and take chances of an acceptance. Instead, the city should have, within a reasonable time formally accepted the hall and entered into an agreement to supervise and

maintain the same for the purposes stated in the will, if such are valid purposes as hereinafter discussed.

Re: De Bancourt, 279 Mich. 518, 272 N. W. 891, 110 A. L. R. 1346, considered a case very much in point, where the testator gave money to the Salvation Army for a new building, when the executor was satisfied that the Army would be able to finance the building. The will was then admitted to probate in 1929, and in 1932 the executor sought to have his final account approved and the estate closed, at which time the executor stated that he was not satisfied that the Army would be able to finance the building, and asked permission to pay the money over to the legatee, and which was ordered. It is not clear from the opinion as to what additional finances were needed for the building but the testimony was that the representatives of the Army thought they could raise sufficient funds for that purpose, and that $6000.00 was raised by the general headquarters therefor. The court stated that such funds were not certain to be used for the building purposes, and that it was not certain that the building would ever be built, and the real question was whether this estate should be strung along indefinitely "in order to enable the Salvation Army to determine for itself whether it is going to take any steps toward the erection of a building in the city of Jackson." The court also made the following statements which are quite applicable to the present case:

> "The testator had a right to rely upon the fact that his estate, under his will, would be probated

in the usual and ordinary course through the probate court, and that the beneficiaries of the legacy in question would place themselves in a position so they would be entitled to the legacy within the period usually and ordinarily fixed by the probate court for the settlement of estates.

When the right to a legacy is dependent upon the performance of onerous conditions imposed by the testator on the legatee, there is no presumption of the acceptance of the legacy and no acceptance in fact until such conditions have been performed. The legacy to the Salvation Army could under the circumstances vest only on acceptance by the legatee. 69 C. J. p. 967; Defreese v. Lake, 109 Mich, 415, 67 N. W. 505, 32 L. R. A. 744, 63 Am. St. Rep. 584. The legatee has given no notice of election to accept the legacy. Such action must have been taken within a reasonable time. 69 C. J. p. 972."

COULD THE CITY RECEIVE THE PROPERTY FOR THE PURPOSES STATED IN THE WILL?

Subd. (f), Paragraph Seven provides, that the hall shall be used "for general community purposes, such as for the officials and business departments of said city of Narka, Kansas, for church, and school purposes of all kinds, for civic entertainments, and such other uses as such city of Narka, Kansas, through its governing officials, shall determine from time to time fitting and proper, and within the law governing such places owned by a city of the class to which it now belongs or may hereafter become."

Fnding 21 (Abst. 30 and 31) interpreted the foregoing section as follows:

> "The will does not contemplate that the building may be used by a church or social club unless such use is fitting and proper and within the law, but the building must be so constructed as to be adapted for and suitable to such use."

Just what the trial court meant by the foregoing quotation is uncertain, because it first indicates that if it is illegal for the bulding to be used for church or social club that it need not so be used, then the court concludes "but the building must be so constructed as to be adapted for and suitable to such use." Probably this means that the building must be constructed by the trustees for church and social purposes, but that the city does not need to use the same for such purposes, after it has been so constructed. Applying this holding to the purposes for which the building must be constructed by the trustees, we find that it must be built for legal city purposes, for church and school purposes, for civic entertainments, and then such other purposes as the city may determine to be fitting and proper. The plan as proposed by the will was that the trustees and city should enter into an agreement as to the purposes for which it should be built, as contemplated by the will, and that the city would supervise and maintain for such purposes. Had the will provided that the building be built solely for city and school purposes, there would still be difficulty as to the supervision and maintenance for school purposes, which would be under the jurisdiction of the school authorities rather than under the city authorities. But the will does not stop there and requires that the build-

ing be built for church and for civic entertainments; and any organization or group of individuals asking to use the hall for either of such purposes would be entitled thereto, and doubtless this would include private and public dancing, with the result that the city would find itself running a dance-hall.

10 Am. Jur. 617 states the accepted rule as to purposes for which a city may accept a charitable trust:

> "A municipal corporation may act as trustee of a charitable trust where the trust created is germane to the purpose for which the corporation was called into being, and where the administration of the trust and the liabilities it imposes are not foreign to the objects for which the corporation was instituted. In conformity with this rule, it has been frequently declared that a municipal corporation may act as a trustee of a charitable trust for the support or establishment of educational purposes, such as free or public schools, within the municipality. Similarly, a municipal corporation may administer a trust for the establishment or support of hospitals, for public library purposes, for the establishment or support of a public park, for the relief of animals, and for the relief of the poor."

The same text on page 618 points out that such does not include religious purposes as follows:

> "According to the majority rule, municipal corporations cannot hold land in trust for religious purposes. It is clear that since the establishment of this government it has always been the intention of its citizens entirely to separate church and state. In all our constitutions, such an intention is clearly expressed and in the legal light of this history, it is manifest that at no time was any municipal cor-

poration ever organized with any power or authority in matters affecting religious worship."

10 A. L. R. 1368 has an annotation on the subject, and many cases are cited as supporting the rule, that a municipal corporation "may accept and administer a trust committed to it for a purpose germane to the objects of the corporation." This annotation follows the case of Treadwell v. Beebe, 107 Kan. 31, which held that a city could accept a trust to buy food and fuel for the needy of the community, and for the treatment of cancer. The court reviewed the Kansas laws pertaining to cities of the second class, and concluded that the city could exercise the trust provisions for the poor as being within the scope of the purposes for which the city was created. The authorities seem agreed that the city could have nothing to do with supporting or maintaining a building used for religious purposes.

Bennett v. LaGrange, 153 Ga. 428, 112 S. E. 482, 22 A. L. R. 1312, held void a contract between a city and the Salvation Army that the former provide a monthly payment to the Army who shall take care of all charitable cases, the decision holds that the Army was a benevolent and religious institution wherein a church was an organization for religious purposes, "for the public worship of God," and cites 11 C. J. 762. The opinion concludes that public funds could not be used to carry out this agreement. Certainly there can be no holding that cities in Kansas may use public funds for church purposes, especially in view of Sec. 7 of the

Kansas Bill of Rights, which guarantees religious liberty, and also provides that there shall no "preference be given by law to any religious establishment or mode of worship."

It was held in Fiezel v. Trustees, 9 Kan. 592, that where property had been conveyed to certain trustees for church purposes, that the courts will require that it be used for such purposes, but will not compel any one to attend such service nor become a member thereof, nor prevent the withdrawal of members from the church. In other words, religious liberty requires that each church conduct its worship in such ways as it desires and as provided by its doctrines and rules. See also King v. Smith, 106 Kan. 624, and Board of Trustees v. Mt. Caramel Community Association, 152 Kan. 243.

Vol. 2 of Bogert on Trusts, pages 1052 to 1054, points out that the extent of the powers of cities in accepting charitable trusts is doubtful. A gift to a city to aid education or relieve the poor or sick within its borders, or to improve the streets or parks or other public conveniences "seem to be within the scope of municipal charitable trusts." But, "it would seem beyond the powers of a municipal corporation to accept a trust to foster religion in general, or any particular religion." *** "To carry on a social club, or maintain a private cemetery lot, would seem, obviously not a matter of municipal concern which could be administered as a municipal charitable trust."

So it would seem that the hall could not be used for religious or social club purposes, and certainly not for public dance purposes, and it is doubtful as to anything falling within the words, "civic entertainments." Should it be concluded that the hall could be built for city administrative purposes and school purposes of all kinds, but not for church or civic entertainment, then the question arises as to whether the trustees could legally contract with the city to build the hall for city and school purposes alone. The trial judge thought that the way out was for the trustees to build a hall so that it could be used for all, including church and civic entertainment purposes, but that the city was not required to so use the same, if not "fitting and proper and within the law." (Abst. 31)

It would seem that if the testator intended that the hall should be accepted and maintained by the city for a number of purposes, a part of which are valid and a part of which are invalid, that the rule stated in Bogert on p. 1307 applies, where he points out that even in states exercising the cy pres power:

> "It cannot be employed to turn into a valid charitable trust an invalid mixed trust, where the gift was for charity and other purposes of an uncertain character or was for charity and clearly private objects."

GIFTS FOR CHARITABLE AND NON-CHARITABLE PURPOSES OR FOR UNCERTAIN OBJECTS ARE VOID.

10 Am. Jur. 655 makes this statement:

> "In order that a gift or devise to charity shall possess that certainty which will give it validity, the language employed must require that the fund shall be expended for some charity, according to the legal signification of that word, and for nothing else. A trust which, by its terms, may be applied to objects which are not charitable in the legal sense is too indefinite to be carried out.
>
> In the determination of whether a gift is for a charitable purpose, the question is not whether the trustee may not apply it to purposes strictly charitable; it is whether he is bound to apply it to charitable purposes only."

14 L. R. A. N. S. 87 and 37 L. R. A. N. S. 1003, annotations are cited in support of the foregoing as well as other authorities. Likewise 115 A. L. R. 1123 has an annotation on the subject, which states the rule as follows on page 1117:

> "On the other hand, if under the general description of the organizations or trusts to which the income is directed to be distributed, the trustee may select as beneficiaries, organizations or trusts not devoted exclusively to charitable purposes, the entire gift must be treated as void."

The test stated in 14 L. R. A. N. S. 88 note, and copied in 10 Am. Jur. 656, is as follows:

> "Whether the inclusion of a noncharitable purpose will invalidate a charitable trust depends upon whether or not the connection between the purposes

> is such that the charitable purpose runs through, permeates and modifies the whole; and this is a question of construction."

From the cases supporting the foregoing statement it is clear that in some instances the dominant intent is for charitable purposes, so that uncertain gifts will be interpreted for charitable purposes. Along the same line is the annotation in 115 A. L. R. 1123, and as shown in the second column such annotation is limited to the decisions "in which the testamentary language involved is so equivocal that noncharitable purposes or objects might be but are not necessarily included therein. In determining whether or not non-charitable purposes or objects are included the whole will is to be considered and interpreted." These rules were well stated and applied in Mitchell v. Reeves, 123 Conn. 549, 196 Atl. 785, 115 A. L. R. 1114, and is commented upon in the annotation on page 1124 as follows:

> "The fundamental principle of testamentary construction is of course the determination from the language used of the testator's intention. In ascertaining such intention, as brought out in Mitchell v. Reeves (Conn.) (reported herewith) ante, 1114, the will is to be read as a whole and any underlying intent disclosed thereby is to be considered in determining the meaning to be accorded to the particular language under consideration. Therefore the decisions which hold a bequest void for uncertainty because of the possible inclusion of noncharitable purposes or beneficiaries would seem, in the final analysis to rest on the premise that the testator's underlying intention that only valid charitable purposes should be served is not clearly estab-

> lished. It is of course recognized that the intention of the testator to create a charitable trust is of no avail where the gift made is not in legal contemplation operative for the benefit of the public, or one which the court itself could not necessarily undertake and control as regards administration, or, in other words, where it is not for a legal charitable use."

Robinson v. Hammel, 154 Kan. 654, considered the doctrine just noted, but held that the underlying intent of the testator was to create a charitable trust. The Supreme Court stated the proposition as follows on page 656:

> "While presented with vigor and from various viewpoints, all the arguments on behalf of appellants center in their contention that by the use of the words 'or benevolent' near the end of subsection (c) the testatrix made it possible for her executor to distribute the one-fourth of the net estate mentioned in that subsection to noncharitable organizations, hence that the attempted gift failed and the property passed by descent to the heirs at law of the testatrix."

The question is, does the gift under second in subd.(f) of the seventh paragraph include noncharitable purposes or objects, so that the trustees *might* aid persons who are not classed as objects of charity?

THE PROVISION TO AID THE NEEDY IS NOT CHARITABLE.

The will authorizes the trustees to use the funds for those in need and worthy of aid in the judgment of the trustees.

Valid provisions to aid the poor must be limited to those classed as paupers, otherwise such are void. See 2 Bogert on Trusts, sect. 373, p. 1156. Also pp. 1159 and 1160, where appears the following:

> "It is self-evident that the beneficiaries of a trust to relieve poverty must be poor persons only. A trust to furnish financial aid to those whose income is sufficient or more than sufficient to provide them with the average normal necessities of life is not a trust to relieve poverty or want, but is a trust to increase comfort or provide luxury. It certainly cannot be sustained as a charitable trust of the eleemosynary type. If the settlor desires his charitable trust to be sustained on the ground that it is eleemosynary and based on the furnishing of the necessities of life, he must limit the beneficiaries to persons who are lacking to some extent in those necessities."

The court may take judicial notice of the fact, and the evidence shows, that at the time the will was made and at times since there has been no class in or about Narka, Kansas, but could provide themselves with the average normal necessities of life, hence there was and is no poverty there. Even though there might be an occasional case of poverty such is not sufficient to uphold a trust to meet the needs of poverty in a community. There must be a class in the community, Bogert, Sec. 373, p. 1157, note 20.

The provision in the will, which couples with those in need, those that are "worthy of aid in the judgment and opinion of said trustees," signifies non-charitable needs according to the opinion of the trustees. That is, the trustees are to use their discretion in providing for those that the trustees consider in need of something, whether that be a necessity or otherwise, and who the trustees consider worthy of aid. This indicates the right of the trustees to give to those who might need the necessities of life and may give to those that need something not considered a necessity. To illustrate, one individual might need certain machinery to efficiently carry on his farming or business, another might need other farm equipment, and another might need better clothing for social purposes. The will contemplates aid to the worthy rather than help to the paupers.

Bogert, section 370, on page 1136 points out that worthiness may include non-charitabe purposes as follows:

> "A 'deserving object' may well be noncharitable, unless there is an indication that the recipient must deserve the bounty because of some condition which the law regards as the basis for a charity. If the instrument requires the cestuis to be 'deserving' because of their poverty or sickness, the gift may well be charitable; but, if the door is left open for one to qualify as 'deserving' because he has been a good citizen generally, or lived a long time in the community, or been a friend of the settlor, the gift cannot be said to be marked as charitable."

State v. Osawkee Twp., 14 Kan. 418, held void law which authorized the township to buy seed wheat for

needy farmers; but such was held void because not limited to the paupers, as shown by the following:

> "The relief of the poor, the care of those who are unable to care for themselves, is among the unquestioned objects of public duty. In obedience to the impulses of common humanity, it is everywhere so recognized. Our own constitution but gives utterance to the universal voice when it says, 'The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon sympathy and aid of society.' Art. 7, s. 4. It must be borne in mind however that the term 'poor' is used in two senses. We use it in one sense simply as opposed to the term 'rich'. Thus we speak of the ordinary laborers, mechanics and artisans as poor people, without a thought of describing persons who are other than self supporting. Indeed, the large majority of our people are poor people, and yet they would feel insulted to be told that they are objects of public charity. We use the term also to describe that class who are entirely destitute and helpless, and therefore dependent upon public charity. The dictionaries recognize this two-fold sense. Thus, Webster gives these definitions: '1. Destitute of property; wanting in material, riches, or goods; needy, indigent. It is often synonymous with indigent, and with necessitous, denoting extreme want. It is also applied to person who are not entirely destitute of property, but who are not rich; as, a poor man or woman; poor people. 2. (Law). So completely destitute of property as to be entitled to maintenance from the public'."

See also Dailey v. City of New Haven, 22 Atl. 945, 60 Conn. 315, 14 L. R. A. 69, that city can not administer a trust for poor who are not paupers.

As pointed out in Treadwell v. Beebe, 107 Kan. 31, a city has power to accept a trust to buy food and fuel for needy and deserving inhabitants of the city. This was held to apply to those classified as the poor, as shown by p. 37:

> "And the relief of the poor of a city is certainly a proper concern under its corporate duty to provide for the general welfare of the municipality. Food, fuel, clothing and shelter are the primary essentials of existence within the Kansas parallels, of latitude, and if a city cannot concern itself with the relief of the poor, or with the administration of relief provided by a charitably disposed philanthropist to the deserving poor, in the matter of distributing food and fuel, then all the long journey which organized society has traveled from the days of the cave man comes to naught, and our boasted humanitarianism is but a pretense and a humbug."

Hollenbeck v. Lyon, 142 Kan. 352, held that a gift in trust for the benefit of "needy poor" in and around Abilene, Kansas, created a charitable trust.

Had the present will expressly limited the aid to the relief of poverty, then of course in that respect it would be clearly a charitable gift; and if, by interpretation, the dominant intent of the will is the same, then it will be sufficient, if there is a class to receive aid. On the other hand, if the dominant intent of the will is that the trustees are left to use these funds for those whom they deem in need of something not necessary to relieve poverty and whom the trustees consider worthy of aid, then the trustees are thus permitted to furnish these funds for a non-charitable purpose. See authorities cited, especially Bogert, pp. 1159 and 1160.

Bogert insists as shown on p. 1157, that there must be a class of poor of sufficient size "to create a general public interest in the enforcement of the gift," before there is a public charity in that respect.

The testimony in this case by E. E. Holly, (Abst. 53), is that while he was county commissioner there were ten or twelve people in the Narka vicinity receiving assistance or pensions. He did not say how long he had been commissioner and hence these ten or twelve people would stretch over an indefinite period of time. Besides, receiving public assistance or pensions removes those from the class of poverty stricken who want the necessities of life. As will be later pointed out, it could very well be that the present social relief act does away with the need of gifts to communities for the relief of poverty. At any rate there is nothing in this record to indicate there was a class of poor in Narka and vicinity to be aided.

THE RECORD SHOWS NO SUFFICIENT CLASS OF POOR OR CLASS TO BE EDUCATED.

There must be a substantial class of poor and likewise those to be educated in the community to be classed as objects of charity to the extent that the community is interested in the enforcement of the trust. See Restatement Trusts, Vol. 2, Sec. 375, p. 1161:

> "A trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust.

Comment:

a. When the beneficiaries of a trust are limited to a particular class of persons, it is a question of degree whether the class is large enough to make the enforcement of the trust of sufficient benefit to the community, so that the trust will be a charitable trust, or whether on the other hand it is so small that the community is not interested in its enforcement so that if valid it will be a private trust."

Also page 1162:

"When the beneficiaries of the trust are limited to such a small class of persons that the enforcement of the trust is not of benefit to the community, the trust is not a charitable trust even though the purpose of the trust is the relief of poverty or the advancement of education or religion or health."

Vol. 2 of Bogert on Trusts, page 1102, deals with the necessity of a sufficient class as follows:

"The class must be so described that the wide distribution of charitable benefits which a charitable trust demands is to be accomplished. This would seem to involve the selection of a class of sufficient size so that an appreciable portion of society will ultimately obtain the advantages of the trust, and also such a choice that the members are of a character to be capable of receiving the mental, moral, physical, or kindred benefits which the charity seeks to provide. Conceivably the courts might hold that a trust for a very small class, which might have as its maximum membership a half a dozen individuals, was too limited in its effect to make it of public concern and hence charitable. Arguably, also, the courts might strike down a trust to relieve poverty because all the members of the class selected were sure to be self-sustaining and never in want.

> The charitable trust class of cestuis must possess such size and qualifications for membership that the trust will furnish a substantial benefit of a charitable nature to the community at large."

Bogert, section 373, page 1157, also states:

> "So long as the class of poor to be benefited is large enough to create a general public interest in the enforcement of the gift, there is a technical charity."

There was no evidence as to a poor class and there was very little evidence that indicated a need for educational purposes, as provided in the will. Several witnesses indicated that they would like to have had some help in that respect. (Abst. 52 to 53) But the fact remains that the trustees did not testify that there was any class of needy poor or class to be educated as contemplated by the will; and besides, they have never used that money for either purpose. This demonstrates that there was no class of poor or those to be educated. It would seem that the rule stated in 67 A. L. R. 1273 applies:

> "Where parties interested have acted upon a not unreasonable construction of an ambiguous will, such fact may be considered by the court in deciding as to the true construction."

The only assistance that the trustees have ever asked from the courts pertained to the sale of the farm, for less than $150.00 per acre. Just why the trustees have never sought a general construction has not been disclosed; but probably the trustees and their attorneys

could not allege facts upon which to obtain such construction and instructions. It certainly would have been necessary to advise a court of equity, had construction been sought, that there was a class of poverty stricken individuals who needed help and likewise a class of young people who needed education, but that the trustees were unable to determine who rightly fell within these classifications as described by the will. Evidently there never has been a class of needy poor in the city of Narka and that vicinity; and the trustees and their attorneys rightly concluded that such gift was mixed with the benefaction for educational purposes, and if one fell they both fell. See 10 Am. Jur. 655 and 656, from which a quotation is set out above.

For two reasons the gift for those in need cannot be sustained. First, such would include non-charitable purposes. Second, the evidence and the conduct of the trustees show no sufficient class of poor to be benefited by such gift.

CY PRES DOCTRINE.

Bogert on Trusts, Vol. 2, Sec. 435, p. 1307, points out that the Cy Pres Doctrine does not help, the text being as follows:

> "The exercise of this power, however, is based on the existence of a valid charitable gift. It cannot be employed to turn into a valid charitable trust an invalid mixed trust, where the gift was for charity and other purposes of an uncertain character or was for charity and clearly private objects."

The very uncertainties involved in determining who in *need* might be objects of the so-called charitable trust renders void the portions of the Denton will marked "Second" under subd. (f), (Abst. 77), since there may be objects that are not charitable mixed with those that are charitable. Nor does the cy pres doctrine help in Kansas.

In Re Weeks, 154 Kan. 103, 107, held:

> "As used in this state the doctrine seems to be no more than the application of rules long used by courts of equity in interpreting written instruments to ascertain the intention of the grantor or testator, and in carrying out such intention. Such rules have been applied by this court in a large variety of cases, but never to carry out an intention that is a direct violation of law, nor for a purpose foreign to what is determined to be that of the grantor or testator."

What separable valid trust, that can be classed as charitable, remains under the Denton will? It takes more than a general charitable intent towards the community; and "if the charity does not by its own terms fix itself on a well defined object or is not susceptible of such interpretation by the court, but is general and indefinite, it must fail." The last quotation is from Jones v. Patterson, Mo. 195 S. W. 1004, L. R. A. 1917 F. 660, 662, and is supported by a number of authorities. In that case a trust for general missionary purposes was held too indefinite. So here a general desire to aid certain ones in need in the community of Narka is too indefinite.

Shannep v. Strong, 160 Kan. 206, held that an express trust provided in a will lapsed, and that the title to the trust property passed to the residuary legatee. The will gave certain real estate to a trustee to manage, control, sell, invest the proceeds and pay the income to a United Brethren Church at Burns, Kansas; and this court held that such did not create a general charity, and since there was no such church remaining at Burns that the gift lapsed. The contention was that the United Brethren Organization should have the use of the funds, and we find the following statements by this court in the opinion:

> "But what about this testator's intent and purpose in that regard? It is clear he intended to create a charitable trust. But that fact does not conclude the vital and primary question here presented. That question is whether the testator intended to create a trust for religion generally and for all that may be done under the name of religion or whether he intended to create a trust for the benefit of a particular church in a particular community.
>
> "Where a settlor discloses an intent to create a particular charity, that is, a charity for the benefit of a particular organization or institution rather than an intent to create a general charity the doctrine of *cy pres* is not properly applied.
>
> "Manifestly where the intention of the testator appears there is no occasion for the application of any rule in aid of construction. We think the testator's intention in the instant will is reasonably clearly indicated. We think his dominant purpose and intent was to aid the two particular local churches in his old home town rather than to create a general charity for religious purposes.

> "It follows that, in the absence of a residuary clause, the property in question would stand, and should be disposed of, as intestate property. (Morse v. Henlon, 97 Kan. 399, 402, 155 Pac. 800; 2 Bogert Trusts and Trustees, paragraph 418, pp. 1276-1277, paragraph 468, pp. 1443-1445.)"

In the opinion the court refers to 2 Bogert on Trusts and Trustees, Sec. 436, which deals with questions of charitable intent or particular intent, as to when the cy pres rule shall be applied; and that some courts have held that such rule is to be applied "only where the settlor intended to aid charity in general, or charity of a particular type in general, and selected the means in question merely as a preferred device for aiding charity in general or the named type of charity. They have held that cy pres is not to be used where the settlor desired to aid charity by a specific means, and intended that, if his scheme for helping charity was not available, the fund should be used for charity no longer."

It is important to keep in mind that the foregoing portion of Bogert's work, immediately follows his statement as set out above to the effect that the cy pres rule cannot be employed "to turn into a valid charitable trust an invalid mixed trust." If we are correct in our contention that the Denton will permits the trustees to use the funds for non-charitable purposes, and that such a gift is mixed with charitable purposes, then the gift is invalid, and the cy pres doctrine would not apply in any jurisdiction, including Kansas. Sec. 436 of Bogert, and which is cited in Shannep v. Strong, supra, deals with

gifts that are admitted to be solely charitable, but are of the general type rather than of a particular type. Again the authorities, who apply the cy pres rule, hold as pointed out in Shannep v. Strong, that if only a particular intent is expressed, then the property is not to be used for a general charitable purpose.

When is the cy pres doctrine applicable in Kansas? In Re Weeks, supra, this court stated that such doctrine is no more than a rule of interpretation, and that the intent as expressed in the will must be carried out or the will fails. Shannep v. Strong refused to apply the cy pres doctrine, because of the particular intent expressed in the will. Bogert on Trusts and Trustees, Sec. 433, discussed this doctrine as applied in the United States, and on pp. 1297 to 1299 shows that in a number of states the doctrine has been entirely repudiated, and that:

> "The reasons for the refusal to recognize the cy pres power in these states seem to be, first, that the courts have looked upon cy pres as a rule of arbitrary disposition, giving the chancellor power to remake deeds and wills and to allocate capital or income according to his own social or religious views; and, secondly, that cy pres in the minds of many judges has come to be associated with royalty and monarchial privileges and hence has become distasteful to officials in a democratic country. Some of the prejudice naturally attaching to the prerogative cy pres has become fixed upon the judicial cy pres by a loose course of reasoning."

It would seem that the two Kansas decisions above cited are supported by the same reasoning as given by

the states who refuse to follow the cy pres doctrine, as pointed out by Bogert in the last quotation. If the intent of the will is not ascertainable, or cannot be carried into effect, then the gift for trust purposes would lapse. As applied to the present case, if the court concludes that the dominant intent of the testator was to aid those not classed as charitable objects, and such is mixed with charitable purposes, then the intent cannot be carried into effect. Certainly this court cannot be asked to say that since there was a charitable intent expressed in the Denton will, that the trustees should continue to hold the assets. Instead, this court should say that the will shows invalid mixed trusts, and therefore the will fails; also the situation is such at this time that the will cannot be carried into effect.

THE TRUST PURPOSES CANNOT BE CARRIED OUT.

The hall fails, first, because not accepted, second, the city could not maintain the same for the purposes stated, and third, the trustees were given the discretion of building the hall and they, by their delay, have decided against the hall.

The trust estate is not available to those in need, since such includes non-charitable purposes and because no charitable class can be ascertained. The trust provision to aid worthy young men and women in obtaining an education is so mixed with the non-charitable purpose of aiding those in need of something that the whole must fail. Also these provisions for aid were

to be done within a certain time, and such cannot now be thus accomplished. Again, the will appears to vest in the trustees named, and in them or their designated substitutes, the exclusive discretion to aid those whom they conclude to be worthy, if they find any thus worthy. It would seem that the failure to act for the many years that the trustees have had these powers, shows a decision on the part of the trustees not to use these assets for any of the purposes named in the will.

The failure of the trustees to act affords ample ground for terminating the so-called trust. See Restatement on Trust, section 397, as follows:

> "(1) Except as stated in Subsection (2), a disposition for charitable purposes will not fail because of the failure of the trustee to act or for want of a trustee.
>
> (2) If the settlor manifests an intention that the intended charitable trust shall not arise or shall not continue unless the person named by him acts as trustee, or if the purposes of the trust cannot be carried out unless the person named by him acts as trustee, the intended charitable trust fails unless the person named by him as trustee acts as trustee."

In explanation of the foregoing this text on page 1192 points out the factors to be considered in determining whether or not the trustees have failed, are as follows:

> "Where the settlor leaves property for such charitable purposes as the trustee may select, the factors which are or may be of importance in determining whether the power of selection is limited to the trustee originally named include the following: (1) whether and to what extent the intended charitable purposes are indicated by the terms of the trust;

> (2) whether the principal is to be immediately applied or whether the income is to be applied for an indefinite period; (3) whether the trustee was selected because of his peculiar knowledge of the wishes of the settlor; (4) whether the trustee is an individual or a corporation; (5) the relation between the settlor and the trustee; (6) whether by the terms of the trust provision is made for the selection of successor trustees."

163 A. L. R. 784, begins an extended annotation on the questions of definite and indefinite charitable gifts and as shown by this annotation the various jurisdictions have held differently. This note also points out that there are many statutory enactments taking care of these questions. On p. 806 and 807 the following bears on situations where it has become *impossible* or *impracticable* to carry out the trust provisions:

> "It is one thing that a will or deed is silent or indefinite as to a trustee; it is another thing that matters designated to be done are or have become impracticable or impossible of execution."

In support of the foregoing the case of Fontain v. Ravenal, 17 How. (U.S.) 369, 15 L. ed. 80, is cited. This case held that it was impossible to carry out the will which gave a life estate to the wife, and then authorized the executors or survivors of them to use the estate for such charities as they might deem beneficial to mankind. The executors predeceased the death of the wife, and it was held that the authority to select the beneficiaries was specifically given to the executors, and could not be used by any other person or persons. It is pointed

out in the opinion that under the law of Pennsylvania, had the executors survived the widow, that they could lawfully have used the funds for the charity selected by them. As to whether such would be so in Kansas is immaterial, because we say that this will not only left it to the three trustees or survivors or one substituted by them, to designate the beneficiaries; but that, their discretion is not limited to charitable purposes but might be used for non-charitable objects. As to the selection of a substitute for the three trustees, subd. (i) of the will (Abst. 79) leaves it to the two present survivors to substitute or not, and since they have chosen not to substitute they have thereby elected to carry out this will in such a way as they so elect. Their acts and conduct to date show a definite election to provide nothing for the hall or to aid those in need or for educational purposes. This discretion on their part of so electing, has now been carried to the point, that the trustees cannot furnish funds to aid within the time prescribed by the will. The result is that the discretionary power of the trustees, not to use the funds, makes it impossible to carry out the will in the time and in the manner as designated by the testator.

The Denton will should be construed as authorizing the trustees to not use the funds for any of the suggested purposes, and if on that account or because the funds could not be legally used for any of such purposes, then the property would go to the heirs at law of the decedent. The present suit is not one to construe the

will and define the powers of the trustees, but is brought for the purpose of having the court say that the will can not now be carried out under its terms. None of the evidence offered at the time of the trial shows that the will would be carried out in the future. Neither the trustees nor the Attorney General asked the court for directions in respect thereto.

Perhaps Bogert on page 2930 very well summarizes the situation:

> "A trust which has become passive obviously has no further function. Some courts have declared trusts ended because they 'found no further use in keeping the trust alive.' or found that the administration of the trust was extremely difficult and onerous, if not actually impossible. In cases of this type the court feels that the entire reason for continuing and enforcing the trust has disappeared. The only excuse for the trust was to accomplish a purpose which was in the mind of the settlor. If this goal cannot be attained, there is no justification for obliging the cestuis to take indirect enjoyment of their property."

ORDER TO SELL LAND BY DISTRICT COURT.

Does the probate court control the trustees and official acts to the exclusion of the district court?

59-301 of the 1947 Supplement to G. S. 1935 sets forth the jurisdiction and powers of the probate court, and subdivision 8 deals with trust and powers created by wills admitted to probate, vesting in the probate court the power to control the same and the trustees thereof, and to appoint and remove the same, and "to make all necessary orders relating to such trust estates, to direct

and control the official acts of such trustees, and to settle their accounts; but this provision shall not affect the jurisdiction of the district courts in such cases." Subdivision 12 also vests such court with equitable powers in connection with such trusts and trustees.

Under 59-2602 the 1939 probate code governs all pending probate proceedings, except as ordered otherwise by the probate court. Article 16 of this act is a specific act dealing with the accounting of trustees, and which was not made retroactive. See 59-1611.

The real question in the present matter is whether or not the probate court exclusively has jurisdiction, since these trustees have been regularly reporting to that court. Section 90 of Bartlett's text deals with the probate court's jurisdiction of living trusts, and section 94 deals with the equitable jurisdiction of that court. In the pocket addition there is a review of the decisions of the supreme court dealing with the equitable jurisdiction of the probate court. These cases hold that the equity jurisdiction relates to those matters over which the probate court has specific jurisdiction, and that where a party has adequate remedy for equitable relief in the probate court, and that court is exercising its jurisdiction, such party may not invoke the jurisdiction of the district court as the jurisdiction of the probate court is exclusive. Among the cases cited is the Hoover Estate, 156 Kan. 31. This case held that equitable powers are given probate courts in relation to all probate matters, including testamentary trusts and trustees, and that:

> "Hence the provision that gives probate courts equitable powers refers to equitable powers that are necessary to adjudicate matters that relate to estates of deceased persons, minors, insane persons, convicts, etc."

In Re Estate of Pratt, 164 Kan. 512, held that where necessary to determine what assets belonged to the estate, that the probate court may conduct and require an accounting concerning partnership affairs in which the decedent was interested. This case again pointed out that the probate court may exercise whatever equitable powers are necessary and proper to fully hear and determine any matter before that court. Certainly the probate court could have heard the petition by the trustees for authority to sell the farm for less than $150.00 per acre, and perhaps could have made a valid order permitting such a sale, after the giving of such notice as might be required by the probate law or as directed by the court. If so then how could the district court take that jurisdiction away from the probate court, and thus administer a part of the assets of the trust estate? There also arises the question of the sufficiency of the notice for the hearing of such petition, and had the same been filed in the probate court, then the code would have applied as to the giving of the notice, and which would be essential to the valid exercise of the jurisdiction vested in that court. Instead, the district court attempted to exercise this jurisdiction without any notice as provided by the probate code, and in the exercise of this jurisdiction took the matter out of the hands of

the probate court, which had exclusive jurisdiction thereof.

Herbel v. Nuss, 158 Kan. 376, held that the probate court has exclusive jurisdiction of all matters concerning a will, and controls the official acts of the executors, and in so doing has such equitable powers as may be needed. On page 379 appears the following:

> "The facts pleaded in the petition disclose that the estate of David Herbel is in process of administration in the probate court, and that the administration has not been completed. In the course of that administration the probate court has full power to make such orders and decisions as may be requisite to settle and determine all of the matters which plaintiffs in the present action seek to have the district court settle and determine. In such a case the district court has no original or concurrent jurisdiction, and the decision of the district court that it was without jurisdiction was correct."

54 Am. Jur. 403 states:

> "Historically and ordinarily courts of equity have jurisdiction of accounting by trustees. Under statute, however, accounting of trustees, particularly testamentary trustees, may be vested in a court of probate or surrogacy. But it has been held that a probate court has no power to cite before it persons who have been acting as trustees by construction, for the purpose of settling their accounts. Therefore, a court of equity may exercise such jurisdiction."

The last part of the foregoing quotation is helpful, in that such points out that constructive trustees can be required to account to the district court, even though by statute, trustees are required to account to the pro-

bate court, as required by article 16 of the probate code; since 59-301 Subd. 8 provides as to the probate jurisdiction over trusts and powers, that such "shall not affect the jurisdiction of district courts in such cases." In other words, constructive trustees can be hailed into the district court at any time because they are not under the jurisdiction of the probate court.

In the present case the administration was closed after the new code went into effect, and the assets were turned to the trustees under order of probate court dated April 27, 1940, and have since rendered all their accounts to the probate court. (Abst. 3-4)

It is true that Article 16 of the probate code which pertains to the accounting of trustees applies only to trusts, the administration of which is to begin after the effective date of this act. This act became effective July 1st, 1939, and it was held in the case of First National Bank v. Gray, 151 Kan. 558, that where the estate was started and the will admitted to probate prior to July 1, 1939, but the trustees did not receive the assets or did not qualify as such until after that date, that article 16 of the new code applied as to them.

This holding is exactly in point since the trustees in the present matter qualified on the 5th day of June, 1940, which would be after the present probate code went into effect on July 1, 1939. Article 16 requires all testamentary trustees to make their accountings to the probate court. The decision just cited also points out that the rules of procedure of the new code are to be

followed, except to the extent that the probate court may determine that their application would not be feasible or would work injustice. This follows sec. 59-2602 of the 1947 Supl. to G. S. 1935.

The case of Achenbach v. Baker, 151 Kans. 827, held that where the parties *consented* to the district court exercising jurisdiction over the trust matter, that such vested that court with adequate jurisdiction. Such holding does not apply to the present matter because the trustees have at all times accounted to the probate court, and there is nothing in the present record that indicates a consent on the part of these appellants that the district court assume jurisdiction over this estate for any purpose.

It also must be kept in mind that 59-301 subd. 8 vests the probate court with jurisdiction "to appoint and remove trustees for such trusts, to make all necessary orders relating to such trust estates, to direct and control the official acts of such trustees and to settle their accounts."

THE ORDER BY THE DISTRICT COURT IS VOID.

If the district court did not have jurisdiction the application by the trustees to that court could not give such court such jurisdiction. There are a number of recent cases holding that the question of jurisdiction is always before the court, and any acts beyond the jurisdiction of the court, are void. See Shively v. Burr, 157 Kan. 336; Kelly v. Grimshaw, 161 Kan. 253; Nat'l

Bank v. Mitchell, 154 Kan. 278; Egnatic v. Wollard, 156 Kan. 843; Herbel v. Nuss, 158 Kan. 376.

Consent does not confer jurisdiction over subject matter upon a court, which otherwise has no such jurisdiction. City of Hutchinson v. Wagner, 163 Kan. 735, 740, and cases and Kelley v. Grimshaw, supra. As already shown, jurisdiction over trusts and trustees is in the district court in those cases where the probate court is not exercising jurisdiction, such as in cases of constructive trusts, arising by operation of law. True, trustees can always go to a court having equitable power for directions. But the probate court now has such equitable powers. See In Re Hoover Estate, supra. After the expiration of one year from the appointment of executor in the Denton estate, the trustees should have qualified, and their failure entitled the Attorney General, and perhaps the beneficiaries under the will, to go to some court to compel the carrying out of the trust provisions. But where such was not done and the trustees qualified in the probate court in 1940, they then became subject to the exclusive jurisdiction of that court; and the order of the district court authorizing the sale of the land is void. The trustees can restore the money to the purchaser and thus the land remains a part of the Denton estate. Evidently this can be easily done as the trustees and purchaser Lund have the same attorneys.

A RESULTING TRUST NOW EXISTS IN FAVOR OF THE HEIRS OF SARAH DENTON.

As held in the case of Shannep v. Strong, "in the absence of a residuary clause, the property in question would stand, and should be disposed of, as intestate property." 160 Kan. 214.

The foregoing disposes of the question as to what shall be done with the property in the hands of the trustees, if the trust purposes have failed. As further explaining our position, it is well to consider Bogert on Trusts, Sec. 418, pp. 1280-1281, where it is shown that cy pres rules can avail nothing here.

> "In those few states which have refused to recognize the cy pres doctrine, a resulting trust for the voluntary settlor of a charitable trust, on the failure of such trust, is the natural result. In such states the effect of the failure of the charity ought to be the same as the effect of the failure of a private trust. It should be assumed that the settlor intended that, if the trust became impossible of execution for any reason, the property should be returned to him if living, or his successors if he be dead. The only alternative to such return is to leave the property in the hands of the trustees, to be applied to their own enrichment or to other purposes which were clearly not within the mind of the donor. Thus, in a jurisdiction which has not by decision or statute accepted the cy pres rule, if there is a voluntary conveyance to trustees for church purposes, with no express clause covering the case of failure of the trust, and the church use is abandoned, the building removed, and the property devoted to other uses for a reasonable time, the settlor or his successors are permitted to recover possession and are treated as fee-simple owners. Sometimes these cases speak of

> an "implied reverter" to the grantor, but it is believed that the appropriate theory is that of a resulting trust for him, upon the failure of an express trust which he has created."

As shown by the foregoing quotation, those states refusing to apply the cy pres doctrine would permit the taking over of the assets, either by the settlor or his heirs. The illustration used in the foregoing extract from Bogert, is exactly the case of Shennep v. Strong. So that Bogert would certainly place Kansas among those which have refused to recognize the cy pres doctrine.

ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Findings having been requested, the court asked the attorneys to make their suggestions and these appellants did, as shown on pp. 55 to 59 of the abstract. The court then made findings and a number of which have been attacked by these appellants, as shown by their motion on pp. 65 to 71. In that connection the court was asked to make additional findings, a part of which were made as shown on pp. 33 and 34. Some of these will now be discussed.

The last sentence of finding No. 4 was asked to be stricken and a new finding substituted therefor as shown on p. 65. At the trial the trustees took the position that they were required to do nothing until they were qualified in 1940, whereas the appellants contend otherwise as shown by this brief. Also these appellants con-

tend that as a matter of fact and law the record does not show any justification for the delay in administering such valid trusts, as were authorized.

These appellants also requested a number of other findings as shown on pp. 65 to 70, which the undisputed evidence required, and either such undisputed evidence should be considered or new findings be made as requested.

Request No. 7, p. 66, and No. 8, p. 67, have to do with the sale of the land and correctly sets out the actual facts. Instead, the court found in No. 11 that after a petition was filed in the district court, that proper notice of hearing was given and proof thereof filed on September 24, 1945. No notice was given and the only thing done was an appearance by the city of Narka and the County Attorney. See Abst. p. 73.

The appellants asked certain portions of other findings be stricken including the last two sentences of finding No. 15, which purport to say that there has been no refusal to accept the gift of the building nor determination by the trustees that the building should not be built. It is our contention that the facts and law now warrant the legal conclusion that the hall has been refused by the city, and that the trustees have determined not to build the same.

All of finding No. 16 is asked to be stricken as not being supported by the evidence, such being requested as to the several sentences of such finding. See requests on p. 67.

Again we say that the undisputed facts and the evidence do not justify these findings and they should be set aside.

Finding No. 17 should likewise be stricken as not being supported by the evidence, and in fact the only evidence pertaining to the cost of the building was by Guy Hotchkiss. (Abst. 42 to 44) He testified that the building and roof and floor could be built in the rough for $8000.00, but such did not include heating and plumbing. In fact, reading of his evidence shows he failed to include a lot of things which are necessary to make a city hall. Since the will limits the costs to $8000.00, for which the ground must be purchased and the building erected and equipped, the Hotchkiss testimony means nothing as to the building for $8000.00.

An objection was also made as to a part and all of finding No. 18, as unsupported by the evidence and as being immaterial. This finding purports to say the officials would be willing to vote to accept the hall "if constructed in substantial compliance with the will". There was testimony along this line over the objections of the appellants. As pointed out in this brief, the city cannot accept by putting its officers on the stand to say they will accept if satisfactory. Besides, the will and the law requires the acceptance before the building is constructed. See subd. (g) and (h) of the will on p. 78. It surely could not be held that the trustees must build and equip the hall before they know that it will be accepted by the city.

Finding No. 20 was asked to be stricken as not supported by the evidence and immaterial. Testimony was offered as to people in the vicinity helping to build the hall, which means nothing as to the carrying out of this will. Anyone could say something of that kind and be bound to do nothing. Finding 21 has already been discussed, where the trial court construed the will as meaning that the building should be built for the church or social club, but that it need not be used for such purposes. This is not a finding of fact but a legal construction of the will, and which is not a correct one.

All of finding No. 22, except the first sentence, was asked to be stricken as not supported by the evidence but contrary thereto. There was some testimony concerning aid to young people desiring an education. See p. 52 of abstract as to this testimony, and which did not support this finding; and besides, the trustees are the ones who decide who shall receive this aid, and which decision is final. There were a number of requests made as to additional findings in respect to this matter. See No. 19 and 20 on p. 68.

Certain requests were also made for additional findings in connection with finding No. 18 as made by the court. See p. 69.

Supplemental requests are shown on pp. 70 and 71 which have to do with findings 16, 17, 18, 20, 21 and 22 as made by the court, wherein the findings made by the court are asked to be stricken and new findings made in place thereof. The evidence is undisputed in

this case, and the appellants feel that their requests both as to striking findings made by the court and those requested should have been allowed, if the case is to be determined by the findings. If, however, the case is to be determined by the undisputed material facts, then it makes little difference as to the findings.

These appellants objected to much of the evidence offered by the trustees and the other respondents. There is no need to review or discuss these objections further than has already been done. They are fully set forth and reasons for the objections given in the abstract in connection with the testimony. See pp. 40 to 54. On pp. 44 and 45 of the abstract there were objections and remarks by the attorneys, that clearly show the respondants' position, that the burden was on the trustees to first build the hall before the city had any decision to make as to its acceptance; and that it was improper to call in witnesses to show a willingness to accept the hall if satisfactory after it was constructed. Specification of errors raises objections as to the introduction of evidence, as to findings of fact made and refused, as to judgment rendered and the refusal to render judgment for these appellants, and in quieting title in John B. Lund, and in not requiring the trustees to wind up the trusteeship. (Abst. 81 and 82)

"THIS IS NOT A WILL CONTEST."

Conclusion of law No. 1, (Abst. 32) states that this suit is a contest of Sarah Denton's will. If such is the correct legal conclusion then a testamentary trust could never be terminated. The case of Shannep v. Strong was decided after the 1939 probate code was adopted, and this court did not hesitate in the Shannep case to terminate the trust, since it could not be carried out, as provided in the will. Likewise the present matter, is not a will contest but a suit to terminate an ineffective trust declare a resulting trust in favor of the heirs, and then to require the trustees to wind up their administration, pay up the expenses and turn over the property.

Assume that a deed provided for certain trust matters and an action was brought to have the same terminated, such would not be an action to set aside the deed. So here this present suit is not to set aside the will but to terminate the trusts that were attempted to be set up by the same, and which cannot now be carried into effect. Should this court conclude that these trust matters should be terminated, then perhaps the correct order of reversal should be to direct the district court, sitting as the probate court, to terminate the trusts, set aside the deed, require an accounting with Lund as to rents and profits, and then for the trustees to render their final accounting and deliver the assets to the heirs. Perhaps the accounting with Lund and the closing up of the trust matter could be handled by the probate court under directions from the district court;

and then the probate court could make the allowance for fees and expenses and order distribution to the heirs according to their interests.

Respectfully submitted,

N. J. WARD,
Attorney for Appellants.

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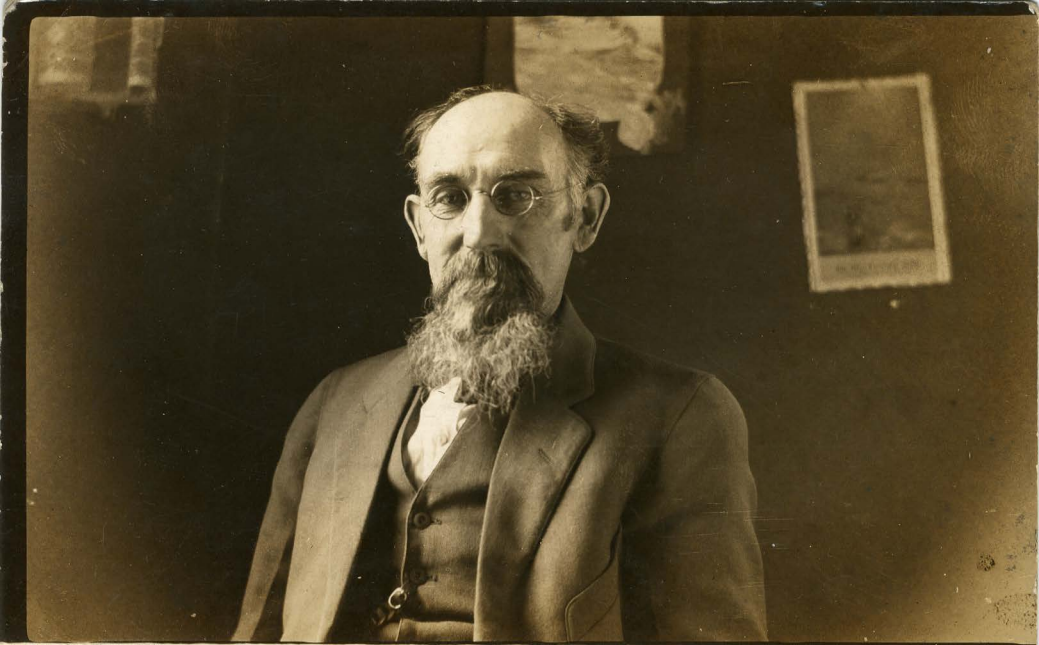

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C. C. Aikman
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